TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 97

CAFETERIA AND RESTAURANT WORKERS UNION, LOCAL 473, AFL-CIO, ET AL.,
PETITIONERS,

vs.

NEIL H. McELROY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED MAY 24, 1960
CERTIORARI GRANTED OCTOBER 10, 1960

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,689

CAFETERIA AND RESTAURANT WORKERS UNION, LOCAL 473, AFL-CIO, ET AL., *Appellants*

v.

NEIL H. McELROY, INDIVIDUALLY AND AS SECRETARY OF DEFENSE, ET AL., *Appellees*

Appeal From the United States District Court for the District of Columbia

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JOINT APPENDIX

Relevant Docket Entries

September 6, 1957—Complaint filed.
October 7, 1957—Answer of M & M Restaurants, Inc. filed.
November 4, 1957—Answer of McElroy, Gates, Tyree and Williams filed.
November 13, 1957—Interrogatories filed by appellants.
December 23, 1957—Answers to interrogatories filed.
February 8, 1958—Appellants' motion for summary judgment filed.
February 27, 1958—Motion of McElroy, Gates, Tyree and Williams to dismiss the complaint or for summary judgment filed.

March 11, 1958—Motion supplementing motion of McElroy, Gates, Tyree and Williams to dismiss complaint or for summary judgment filed.
March 14, 1958—Affidavits of Rachel M. Brawner and Oliver T. Palmer filed.
April 14, 1958—Affidavit of Denver E. McKaye filed.
April 14, 1958—Hearing on cross-motions held.
July 30, 1958—Order dismissing the complaint docketed.
August 14, 1958—Notice of appeal filed.

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1 (Filed Sept. 6, 1957)

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2246-57

CAFETERIA AND RESTAURANT WORKERS UNION, LOCAL 473, AFL-CIO, 1438 U Street, N. W., Washington, D .C., and

RACHEL M. BRAWNER, 2342 Pomeroy Road, S. E., Washington, D. C., *Plaintiffs*,

v.

NEIL H. MCELROY, INDIVIDUALLY AND AS SECRETARY OF DEFENSE, AND THOMAS S. GATES, INDIVIDUALLY AND AS SECRETARY OF THE NAVY, The Pentagon, Washington 25, D. C., and

D. M. TYREE, INDIVIDUALLY AND AS SUPERINTENDENT OF THE UNITED STATES NAVAL GUN FACTORY, AND H. C. WILLIAMS, INDIVIDUALLY AND AS SECURITY OFFICER OF THE UNITED STATES NAVAL GUN FACTORY, M and Eighth Streets, S. E., Washington, D. C., and

M & M RESTAURANTS, INC., DOING BUSINESS AS NAVY YARD CAFETERIAS, M and Eighth Streets, S. E., Washington, D. C., *Defendants*.

Complaint for Declaratory Judgment, for Injunctive Relief, to Vacate an Arbitration Award, and to Recover Damages

Plaintiffs, for their complaint, allege:

1. The Court has jurisdiction under 62 Stat. 930, 28 U.S.C. § 1331, as a civil action arising under the Constitution and laws of the United States, wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs; under 62 Stat. 931, 28 U.S.C. § 1337, as a civil action arising under the National Labor Relations Act (49 Stat. 449, as amended, 61 Stat. 136, 29 U.S.C. § 151), an Act of Congress regulating
2 commerce; under Section 301(a), Title III, Labor Management Relations Act, 1947 (61 Stat. 156, 29 U.S.C. § 185), as a suit for violation of a contract between an employer and a labor organization representing employees in an industry affecting commerce; and under D. C. Code, § 11-306 (1951).

2. Plaintiff Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO, an unincorporated voluntary association, herein called the Union, resides within the District of Columbia, transacts business within the District of Columbia, and has its office at 1438 U Street, N. W., Washington, D. C. The Union is affiliated with Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO. In January 1956, at the time of its affiliation with the International Union, and as a result of such affiliation, the numerical designation of the Union was changed from "471" to "473". The Union remained one and the same organization despite the change in its numerical designation. The Union represents for purposes of collective bargaining and other mutual aid and protection employees who work in cafeterias and restaurants within the District of Columbia and the adjacent area. It represents about 2,600 employees working within the District of Columbia and the adjacent area. The Union represents employees in an industry affecting commerce within the

meaning of Section 301(a), Title III, Labor Management Relations Act, 1947, and Sections 2(6) and (7) of the National Labor Relations Act.

3. Plaintiff Rachel M. Brawner resides within the District of Columbia at 2342 Pomeroy Road, S. E., Washington, D. C. She is a member of the Union.

4. Defendant Neil H. McElroy is Secretary of Defense. Defendant Thomas S. Gates is Secretary of the Navy. Defendant D. M. Tyree, who holds the rank of Admiral in the Navy, is superintendent of the United States Naval Gun Factory, an installation within the Department of the Navy located in the District of Columbia. Defendant H. C. Williams, who holds the rank of Lieutenant Commander in the Navy, is security officer of the United States Naval Gun Factory.

5. Defendant M & M Restaurants, Inc., a corporation, herein called the Company, transacts business within the District of Columbia, and has an office at the United States Naval Gun Factory, M and Eighth Streets, Washington, D. C. It operates numerous cafeterias and restaurants in the several states, including Delaware, Maryland and Virginia. It operates three main cafeterias for the
3 United States Naval Gun Factory within the District of Columbia. In the course and conduct of its business, it engages in trade and commerce within the District of Columbia, and it causes goods to be shipped to it in substantial quantity from other states to the District of Columbia and from one state to another. Its activity affects commerce, and it is part of an industry affecting commerce, within the meaning of Section 301, Title III, Labor Management Relations Act, 1947, and Sections 2(6) and (7) of the National Labor Relations Act.

6. The matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs.

7. Up to September 1946, the three cafeterias at the United States Naval Gun Factory were operated by a Miss

H. K. Dickson. In 1942, during the period of Miss Dickson's operation, the Union was certified by the National Labor Relations Board as the exclusive bargaining representative of the employees working at the cafeterias, following an election conducted by the Board on July 15, 1942. In September 1946, the Company took over the operation of the three cafeterias from Miss Dickson. From that time, continuously to date, the Company has recognized the Union as the exclusive bargaining representative of its employees at the three cafeterias. Section 1 of the collective bargaining agreement between the Company and the Union, entered into on March 15, 1954 and in effect at the times material to this controversy, provides that:

> The Employer agrees to recognize the Union as the exclusive bargaining agency for all employees (excluding cashiers, checkers, and supervisors) of the Navy Yard Cafeterias, and of all cafeterias or food serving establishments which the Employer may take over and operate within the Navy Yard.

This collective bargaining agreement is annexed hereto as Exhibit A.

8. Section 6 of the aforesaid collective bargaining agreement provides in part that:

> The Employer agrees not to suspend or discharge any employee without good and sufficient cause.

This provision has been in each of the collective bargaining agreements between the Company and the Union since the inception of their relationship in September 1946.

4 9. The employees at the three cafeterias operated by the Company for the Naval Gun Factory are civilian nongovernmental personnel. The Company is a civilian nongovernmental employer. The cafeterias are operated pursuant to an agreement, entered into on October 1, 1955, between the Company and the Board of Governors of the Naval Gun Factory Cafeterias. A form

of this agreement, styled "Agreement For Food Services Concessionaire," is annexed hereto as Exhibit B. The personnel of the Board of Governors, composed of seven civilian governmental employees employed by the Naval Gun Factory, are appointed by the Superintendent of the Naval Gun Factory. Section 5(b) of the aforesaid Concessionaire Agreement provides that:

> The Concessionaire shall engage all the personnel necessary to maintain efficient service at a high standard of cleanliness and sanitation, and shall be responsible for all compensation due to such personnel pursuant to the operation under this Agreement. In no event shall the Concessionaire engage, or continue to engage, for operations under this Agreement, personnel who
>
> (i) fail to pass satisfactory medical examinations where the handling of food is involved;
>
> (ii) are not courteous, conscientious and competent to perform the duties to which they are assigned;
>
> (iii) fail to meet the security requirements or other requirements under applicable regulations of the Activity as determined by the Security Officer of the Activity.

10. One of the three cafeterias operated by the Company for the United States Naval Gun Factory is known as the Bellevue Annex Cafeteria, located at Overlook Drive and Chesapeake Street, S. W., Washington, D. C. Plaintiff Rachel M. Brawner worked at that cafeteria as a short order or breakfast cook. Up to her discharge on November 15, 1956, Mrs. Brawner had been employed by the Company for six and one-half years. Working Monday through Friday, 6:00 a.m. to 3:00 p.m., at the hourly rate of $1.18, Mrs. Brawner operated the steam table at the cafeteria, prepared and served breakfast and lunch, cleared tables, washed dishes, and cleaned up. The employment record of Mrs. Brawner was completely satisfactory and she was above average in the discharge of her duties.

11. On November 14, 1956, H. R. Pyles, Secretary-Treasurer of the Board of Governors, telephoned Harold R. Baker, supervisor of the Company's cafeterias at the Naval Gun Factory, to request that the Company have Plaintiff Rachel Brawner turn in her identification badge, stating that defendant H. C. Williams, security officer of the Naval Gun Factory, had advised that a question of security clearance for Brawner existed and that he, the security officer, would no longer permit her to have the badge. An identification badge is required to secure entrance to and exit from the grounds. H. R. Pyles further told Harold R. Baker that, should the request to lift Brawner's identification badge be questioned in view of the provision of the collective bargaining agreement safeguarding employees from discharge except for "good and sufficient cause," section 5(b) of the aforesaid Concessionaire Agreement should be cited as authority for the action requested.

12. On November 15, 1956, the Company relieved Plaintiff Brawner from work at the cafeteria, and instructed her to proceed to the office of Harold R. Baker. There, Baker stated to Brawner that he had been requested to pick up her identification badge, and, when asked why, he stated "for security reasons." Shocked and surprised, Brawner denied that she had ever done anything to bring her security status into question, and she asked what recourse she had. Baker stated he could not tell her anything except that he had been directed to pick up her badge. He suggested that she might see the security officer, or the superintendent, or Oliver T. Palmer, the business agent of the Union. Brawner turned in her badge.

13. On November 15, 1956, the Company discharged Brawner. From that day forward she has no longer worked for the Company. From that day forward she has received no wages or other benefits from the Company. Her employment with the Company was permanently severed.

14. On November 15, 1956, Baker turned over Brawner's identification badge to the security officer, defendant H. C. Williams. At that time, the security officer gave no reason for his action, except to say that he would not permit her to continue to retain the badge because her security status was in question. Neither before, then, nor thereafter did the security officer, the superintendent, the Board of Governors, or any other official give any explanation for this conclusion to either Brawner, the Union, or the Company.

15. In the course of her employment at the cafeteria, Brawner had no access to classified information. Harold R. Baker, supervisor of the Company's three cafeterias at the Naval Gun Factory, has no access to classified information.

16. At the time of her initial employment at the Naval Gun Factory, Brawner had been, as are all employees, screened by the security officer, and no question of security had been raised for six and one-half years.

17. On November 16, 1956, the Company received a confirmatory memorandum from the Board of Governors:

> 1. The Board was notified on the afternoon of November 14, 1956 by LCDR H. D. Williams, Security Officer, Naval Gun Factory, that Rachel Brawner, head steam table employee, presently working at the Bellevue Cafeteria, would have to surrender her Naval Gun Factory badge and would not be permitted to enter the Naval Gun Factory until clearance is certified by the Security Officer.
>
> 2. This office immediately contacted Mr. Baker and requested to return the badge. Rachel Brawner's badge was returned to the Security Officer on 15 November 1956.

18. On November 15, 1956, immediately following her discharge, Plaintiff Brawner went directly to see Oliver T. Palmer, business agent of the Union, and reported to him what had transpired. At a meeting of representatives

of the Company and the Union on November 20, 1956, and in ensuing correspondence between the Company and the Union, the Union protested that the Company's discharge of Plaintiff Brawner was "without good and sufficient cause" and hence in violation of Section 6 of the aforesaid collective bargaining agreement. The Union repeatedly sought from the Company a statement of the reasons underlying the conclusion that Mrs. Brawner did not meet security requirements. The Company repeatedly replied that it did not know, and was unable to obtain from either the Security Officer or the Superintendent of the Naval Gun Factory, any elucidation of the underlying reasons. The Company took the position that its action was based on Section 5(b) (iii) of the aforesaid Concessionaire Agreement. Copies of the correspondence between the Company and the Union are annexed hereto as Exhibits C, D, E, F, G, G-1, H, and I.

19. In connection with the Union's attempt to secure a statement of reasons underlying the conclusion that Plaintiff Brawner's security status was in question, the Union also requested that a meeting be arranged with officials of the United States Naval Gun Factory at which to discuss the matter, and that a fair hearing be accorded Plaintiff Brawner. On December 12, 1956, the Company wrote the Board of Governors, United States Naval
7 Gun Factory Cafeterias, to request "that a meeting be arranged during the week January 7-11, 1957, for the purpose of a hearing relative to the denial of admittance to the Naval Gun Factory of Rachel Brawner." This letter has heretofore been annexed to this complaint as Exhibit G-1. On January 10, 1957, the Company wrote the Union to state that:

> We have been informed by the Superintendent, U.S. Naval Gun Factory via the Board of Governors, U.S. Naval Gun Factory Cafeterias, that such a meeting would serve no useful purpose and is therefore unnecessary.

This letter has heretofore been annexed to this complaint as Exhbiit I. This response was based on a memorandum to the Company from the Board of Governors, which enclosed a memorandum from the Superintendent to the Board of Governors. The latter memorandum reads:

> 1. By reference (a), the Chairman of the Board of Governors, Naval Gun Factory Cafeterias, requested that a meeting be arranged, participants consisting of the Naval Gun Factory Security Officer, members of the Board of Governors, representatives of M & M Restaurants, Inc. and agents of the Restaurant Employees Union to discuss the action relative to the denial of admittance to the Naval Gun Factory of Rachel Brawner, a cafeteria employee.
>
> 2. Paragraph 5(b) iii of reference (b) [Agreement for Food Services Concessionaire between Board of Governors, U.S. Naval Gun Factory and M & M Restaurants, Inc. of 1 October 1955 (Nav Exos 3732 (4-55))] stipulates that the contractors will employ only those who meet the security requirements for admission to the Naval Gun Factory. It is considered that the subject cafeteria employee does not meet these security requirements and therefore entrance privileges to the Naval Gun Factory have been revoked.
>
> 3. It is considered that the above decision is proper in this case and that the meeting proposed in reference (a) would serve no useful purpose and is therefore unnecessary.

20. On January 11, 1957, in accordance with Section 24 of the aforesaid collective bargaining agreement, the Union wrote the Company requesting arbitration of the discharge of Plaintiff Brawner and naming Samuel H. Jaffee as its designee on the Board of Arbitration. A copy of this letter is annexed hereto as Exhibit J. On January 16, 1957, the Company wrote the Union acknowledging the request for arbitration and naming Vinton E. Lee as its designee on the Board of Arbitration. A copy of this letter is annexed hereto as Exhibit K. Thereafter, the

Company substituted John B. Cullen for Vinton E. Lee.

On February 1, 1957, Samuel H. Jaffee filed a De-
8 mand for Arbitration with the American Arbitration Association. A copy of this demand is annexed hereto as Exhibit L. It reads in part as follows:

Claim:

> On November 15, 1956, the Company, improperly and contrary to contract, discharged Rachel Brawner without good and sufficient cause.

Relief:

> The relief requested is that the Company be required to reinstate Rachel Brawner; that Rachel Brawner be made whole for any loss of pay she sustained as a result of her discharge; and that such other and further relief be granted as is appropriate.

Thereafter, pursuant to the procedures of the American Arbitration Association, Nathan Cayton was appointed as the third and impartial member of the Board of Arbitration. A hearing before the Board of Arbitration was set for May 2, 1957.

21. Meanwhile, on January 30, 1957, Bernard Dunau, the Union's attorney, wrote to the Superintendent, Naval Gun Factory, to request the procedure and authority for the action taken against Plaintiff Brawner. This letter is annexed hereto as Exhibit M. It reads in part that:

> We are informed that on November 15, 1956, Mrs. Rachel Brawner, an employee of M & M Restaurants, Inc. at the Naval Gun Factory cafeteria and a member of the Union, was discharged by the employer because you or your security officer determined that Mrs. Brawner did not meet security requirements. As presently advised, we have been unable to ascertain under what authority, and in accordance with what procedure, that security determination was made. Would you therefore be good enough to apprise me of the statute, executive order, departmental regulation, and/

or other basis pursuant to which this determination was made.

Under date of February 27, 1957, a reply was received from the Superintendent. This reply is annexed hereto as Exhibit N. It reads in part that:

> The written agreement entered into by the Board of Governors, U.S. Naval Gun Factory Cafeterias and M & M Restaurants, Inc. on 1 October 1955 specifies that the employees of the M & M Restaurants, Inc. who work in the Naval Gun Factory Cafeterias must meet the basic security requirements as regards entrance to the Naval Gun Factory. It was determined that Mrs. Rachel Brawner did not meet the basic requirements and thus her pass was revoked.

Attached to the letter was a form agreement, styled "Agreement for Food Services Concessionaire," with the penciled notation at the head of it "Executed 1 Oct 1955," and with part iii of Section 5(b) bracketed. This form has heretofore been annexed to this complaint as Exhibit B.

22. On April 17, 1957, the Union, by its attorney, wrote to the Superintendent of the Naval Gun Factory to apprise him of the arbitration hearing to be held on May 2, 1957, and to state that:

> You are invited, personally or by a representative, to attend the hearing to state your position and present evidence in its support relevant to your part or that of your subordinates, in causing Mrs. Brawner's discharge.

This letter is annexed hereto as Exhibit O. No appearance was made either personally or by a representative.

23. On May 2, 1957, a hearing was held before the Board of Arbitration. A stenographic transcript of the hearing was made. A copy of the transcript is annexed hereto as Exhibit P. In addition, Exhibits A through K and M through O, annexed to this complaint, were introduced

at the hearing before the Board of Arbitration as Union's Exhibits 1 through 14. Those exhibits annexed to this complaint which were also introduced at the hearing before the Board of Arbitration bear at the upper right-hand corner of the exhibit the identification given them in this complaint and before the Board of Arbitration. Company exhibits 1, 2, and 2-A, introduced by the Company before the Board of Arbitration, were read into the record and appear at pp. 36-38 of Exhibit P. The Company annexed to its post-hearing brief before the Board of Arbitration a purported excerpt from an agreement between it and the Board of Governnors, Naval Gun Factory Cafeterias, entered into on August 16, 1946. This excerpt is annexed hereto as Exhibit Q. Finally, the Union introduced before the Board of Arbitration as its exhibit 15 the opinion and award in *National Food Corporation*, reported at 24 Labor Arbitration Reports 567 and annexed hereto as Exhibit R. In that case, pursuant to the request of the Director of Security Division, Office of the Secretary of Defense, relayed to the employer by the Department of Defense Concessions Committee, the employer, National Food Corporation, discharged an employee, Esther Mae Thompson, who worked in a cafeteria within the Pentagon operated by the employer, the ground for the discharge being the determination by the Director of Security Division that Thompson's security status was in question. The Board of Arbitration held that Thompson's discharge was without "sufficient cause," and it ordered her reinstated with back pay. Thompson was reinstated, with back pay, and she continues to date to work in the cafeteria within the Pentagon. A relevant excerpt from the opinion in the *National Food Corporation* case is as follows:

> The Company contends that this Board of Arbitration is without power to review the determination of the Director of Security Division, Office of the Secretary of Defense, that Thompson was a security risk. This contention would be relevant if the Director were

authorized to determine that an employee in Thompson's class was a security risk and to request the employee's discharge upon such determination. But the Company has not shown, and our independent search has not uncovered, any statute, executive order, or regulation authorizing the Director to act in the premises. The Company concedes that neither the Industrial Personnel and Facility Security Clearance Program, applicable to nongovernmental employees with access to classified information, nor the security requirements for government employment, applicable to government employees, have any relevance to an employee in Thompson's position. Not only do these programs not confer any authority on the Director with respect to an employee in Thompson's position, but by not conferring any such authority they negate the existence of the authority assumed by the Director. It is significant that the very safeguards accorded nongovernmental employees with access to classified information or accorded governmental employees by these programs would have prevented just the summary action to which Thompson, *a non-governmental employee with no access to classified information*, was subjected.

24. The Union did not know of the Concessionaire Agreement, or of Section 5(b) thereof (see paragraph 9, *supra*), until the Company disclosed their existence after Rachel Brawner was discharged. The Union did not see a copy of the Concessionaire Agreement until a form of it was sent by the superintendent of the Naval Gun Factory to the Union's attorney under date of February 27, 1957, more than three months after Rachel Brawner's discharge. The Union did not know of the memoranda listed in paragraphs 17 and 19, *supra*, until adduced by the Company at the hearing before the Board of Arbitration.

25. Under date of August 6, 1957, the American Arbitration Association sent to representatives of the Company and the Union the award of a majority of the Board of Arbitration in the instant matter, and the majority and

dissenting opinions. The majority of the Board of Arbitration, Samuel H. Jaffee dissenting, held that Plaintiff "Rachel Brawner was not discharged without good and sufficient cause. . . ." The majority based this conclusion on its view that (1) Rachel Brawner had not been discharged because the Company had expressed its willingness to reemploy her "if she could prevail on the
11 government officials to restore her security badge," and (2) the Union should not proceed under the collective bargaining agreement to redress Brawner's discharge, but should proceed in some other way, for the "real grievance of the employee and of her Union" is not against the Company for effecting her discharge but it is against the governmental officials for causing her discharge. A copy of the award, of the majority opinion, and of the dissenting opinion are annexed hereto as Exhibit S.

26. Defendants Neil H. McElory, Thomas S. Gates, D. M. Tyree, and H. C. Williams were and are wholly without authority, whether by way of statute, executive order, regulation, or otherwise, to formulate their own undisclosed security requirements and to cause the discharge of Plaintiff Rachel M. Brawner, without any explication of the underlying reasons or any opportunity to know or meet the evidence, upon their bare say-so that Rachel M. Brawner fails to meet those requirements. In the alternative, if such authority exists, its exercise constitutes a deprivation of property without due process of law in contravention of the Fifth Amendment of the United States Constitution.

27. The action of Defendant M & M Restaurants, Inc., in discharging Rachel M. Brawner for no reason other than the unauthorized or unconstitutional demand as stated in paragraph 25, constitutes a violation of Section 6 of the collective bargaining agreement by which it promised "not to suspend or discharge any employee without good and sufficient cause."

28. The award of the majority of the Board of Arbitration is void for the reasons that (1) the majority exceeded its powers, (2) the majority so imperfectly executed its powers that its award fails to constitute a determination of the matter submitted to it, (3) the award has no support in, but is in manifest disregard of, law, fact, and reason, and (4) the award is against public policy.

WHEREFORE, plaintiffs pray that a judgment be entered:

1. Declaring that Defendants Neil H. McElroy, Thomas S. Gates, D. M. Tyree, and H. C. Williams were and are wholly without authority, whether by way of statute, executive order, regulation, or otherwise, to formulate their own undisclosed security requirements and to cause the discharge of Plaintiff Rachel M. Brawner, or employees in her class, without any explication of the underlying reasons or any opportunity to know or meet the evidence, upon their bare say-so that Rachel M. Brawner, or employees in her class, fail to meet those requirements; in the alternative, that if such authority exists, its exercise constitutes a deprivation of property without due process of law; and that the action of Defendant M & M Restaurants, Inc., in discharging Rachel M. Brawner, or employees in her class, for no reason other than compliance with such unauthorized or unconstitutional demand, constitutes a violation of Section 6 of the collective bargaining agreement by which the Company promised "not to suspend or discharge any employees without good and sufficient cause."

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2. Requiring Defendants Neil H. McElroy, Thomas S. Gates, D. M. Tyree, and H. C. Williams to withdraw their determination that Rachel M. Brawner fails to meet security requirements, to inform Defendant M & M Restaurants, Inc., that they have no objection to the employment of Rachel M. Brawner by the Company, to furnish Rachel M. Brawner an identification badge authorizing her to enter and leave the grounds of the Naval Gun Factory for

the purpose of going to and from her place of employment, and to cease and desist from in any way interfering with Rachel M. Brawner in obtaining or retaining employment with M & M Restaurants, Inc.

3. Requiring Defendant M & M Restaurants, Inc. to reinstate Rachel M. Brawner to the position from which it discharged her, with full seniority and other perquisites of her employment, and to make her whole for any loss of pay she sustained for the period between her discharge on November 15, 1956 and her reinstatement, with interest at the rate of six per cent per annum from November 15, 1956.

4. Holding Defendants Neil H. McElroy, Thomas S. Gates, D. M. Tyree, and H. C. Williams, together with M & M Restaurants, Inc., jointly and severally liable to Rachel M. Brawner for reimbursing her for any loss of pay she sustained for the period between her discharge on November 15, 1956 and her reinstatement, with interest at the rate of six percent per annum from November 15, 1956.

5. Vacating the award of the majority of the Board of Arbitration.

6. Granting plaintiffs the costs of this action.

13 7. Granting such other and further relief as may be appropriate.

/s/ Bernard Dunau
Bernard Dunau

Jaffee & Dunau
912 Dupont Circle Building, N.W.
Washington 6, D. C.

Attorney for Plaintiffs.

VERIFICATION

CITY OF WASHINGTON
DISTRICT OF COLUMBIA } ss:

Bernard Dunau, attorney for plaintiffs herein, being first duly sworn, on oath deposes and says that he has read the foregoing complaint by him subscribed; that he knows the contents thereof; and that he verily believes the matters therein set forth to be true.

/s/ BERNARD DUNAU
Bernard Dunau

Subscribed to and sworn before me
this 5th day of September, 1957.

/s/ W. G. BADEN
Notary Public, District of Columbia

My Commission expires March 31, 1959

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14 **Exhibit A**
[Un. Arb. Ex. 1]

AGREEMENT

This Agreement made and entered into this 15th day of March 1954, by and between M & M Restaurants, Inc., a corporation doing business as Navy Yard Cafeterias, hereinafter called the "Employer," and the UNITED CAFETERIA AND RESTAURANT WORKERS, LOCAL UNION No. 471, hereinafter called the "Union;" and in consideration of the mutual promises herein made, the parties agree as follows:

1. The Employer agrees to recognize the Union as the exclusive collective bargaining agency for all employees (excluding cashiers, checkers, and supervisors) of the Navy

Yard Cafeterias, and of all cafeterias or food serving establishments which the Employer may take over and operate within the Navy Yard.

• • •

6. The Employer agrees not to suspend or discharge any employee without good and sufficient cause. If the Union shall prove that an employee was suspended or discharged without good and sufficient cause, such employee shall upon reinstatement, be compensated for time lost.

• • •

24. The parties agree that they will endeavor to adjust any dispute that may arise from the interpretation or application of this Agreement within a period of 48 hours. In the event that no accord can be reached, the matter in dispute shall be referred to a Board of Arbitration within two days from the date which the parties to the Agreement shall fail to reach an agreement in connection with the matter in dispute, and said Board of Arbitration shall be composed of one representative of the Employer and one representative of the Union, and one disinterested party chosen by the two said members of the Board of Arbitration. In the event the two parties shall fail to agree on a third disinterested party, the parties agree that the American Arbitration Association be requested to appoint a person to serve in the capacity of the third and impartial arbitrator.

• • •

27. This Agreement shall be in full force and effect from March 15, 1954 to March 15, 1957, and shall continue from year to year unless either party gives notice, in writing, sixty (60) days prior to March 15, 1957, of its desire to negotiate a new contract; however, it is further agreed between the parties that the question of wage rates only may be reopened on September 15, 1955, pro-

vided either party gives notice in writing thirty (30) days prior to September 15, 1955 of its desire to reopen the question of wages.

DENVER E. MCKAYE, *Pres.*
For the Employer

EDWARD J. FISHER
For the Union

Witnessed By:

CLAUDE S. BREEDEN, JR.

OLIVER T. PALMER

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26 **Exhibit C**

[Un. Arb. Ex. 2]

November 20, 1956

Mr. Denver McKaye, President
M & M Restaurants, Inc.
Navy Yard Cafeterias
8th and M Streets, S. E.
Washington 25, D. C.

Dear Mr. McKaye:

This is a formal protest against the suspension of Mrs. Rachel Brawner.

On Thursday, November 15, 1956, Mrs. Brawner was relieved of her badge and separated from your employ. So far we have been unable to obtain any evidence that your action was taken with "good and sufficient cause." We, therefore, request immediate reinstatement of Mrs. Brawner in her job and that she be made whole for any loss she has suffered or will suffer until she is reinstated.

In our meeting held today with you on this matter, you indicated you had acted as a result of notification from

the Board of Governors of the Navy Yard to the effect that Mrs. Brawner's security clearance had been cancelled. However, other than the foregoing, you gave us no further facts which would establish that your action was taken in keeping with the language, spirit and intent of Section 6 of the existing contract between us. We hereby request any and all information you may have to support your position.

We will highly appreciate your early reply.

Very truly yours,

OLIVER T. PALMER
Business Agent.

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27 **Exhibit D**

[Un. Arb. Ex. 3]

November 26, 1956

Cafeteria and Restaurant Workers Union
Local 473
1438 "U" Street, N. W.
Washington 9, D. C.

Attention: Mr. Oliver T. Palmer, Business Agent

Re: Your letter 20 November 1956

Dear Mr. Palmer:

Pursuant to your letter regarding Mrs. Rachel Brawner, please be advised that our action was based on the following:

A. Clause No. 3 operating contract which reads:

iii—Fail to meet the security requirements or other requirements under applicable regulations of the activity, as determined by the security officer of the activity.

B. Letter dated 16 November 1956 from Board of Governors, Naval Gun Factory Cafeterias, requesting the surrender of admittance badge until clearance is certified by the security officer.

It is suggested that a request be made for an appeal hearing which will be submitted to the Board of Governors by M & M Restaurants, Inc.

Every effort will be forth coming on the part of representatives of the Board of Governors as well as M & M Restaurants, Inc. to assist in arranging the appeal hearing with the security officer.

Very truly yours,

M & M RESTAURANTS, INC.
D. E. McKAYE, *President*

DEMcK:mvb

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28 **Exhibit E**
[Un. Arb. Ex. 4]

November 28, 1956

Mr. D. E. McKaye, President
M & M Restaurants, Inc.
Naval Gun Factory Cafeterias
8th and M Streets, S. E.
Washington 25, D. C.

Re: Mrs. Rachel Brawner

Dear Mr. McKaye:

This is in reply to your communication of November 26, 1956 concerning the above subject matter.

We will highly appreciate more definite information and we hereby request the following:

1. Copies of your "operating contract" and the letter from the Board of Governors to which you made reference in Sections A & B of your communication;

2. More details concerning the nature of the appeal hearing suggested and the procedure of such a hearing; and

3. More specifics as to why Mrs. Brawner's security clearance was discontinued.

In order to avoid any misunderstanding we wish to make it clear that your compliance with the request enumerated above will in no way prejudice our rights under the terms and conditions of the existing contract between us.

Very truly yours,

OLIVER T. PALMER
Business Agent

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29 **Exhibit F**
[Un. Arb. Ex. 5]

M & M RESTAURANTS, INC.

December 4, 1956

Cafeteria and Restaurant Workers Union
Local 473, AFL-CIO
1438 "U" Street, N. W.
Washington 9, D. C.

Re: Your letter dated November 28, 1956
Mrs. Rachel Brawner

Dear Mr. Palmer:

Pursuant to our telephone conversation; we are reaffirming our comments contained in our letter to you dated November 26, 1956.

Very truly yours,

M & M RESTAURANTS, INC.

DEMcK:mvb

D. E. MCKAYE, *President*

Exhibit G
[Un. Arb. Ex. 6]

M & M RESTAURANTS, INC.

December 12, 1956

Mr. Oliver T. Palmer, Business Agent
Cafeteria and Restaurant Workers Union
Local 473—AFL CIO
1438 "U" Street, N. W.
Washington, D. C.

Dear Mr. Palmer:

Confirming our telephone conversation of today's date we have written the Board of Governors, Naval Gun Factory Cafeterias, Washington 25, D. C. requesting that a meeting be scheduled during the week of January 7-11, 1957 for the purpose of a hearing regarding the denial of admittance to the Naval Gun Factory of Rachel Brawner.

We will confirm the exact date and time as early as possible.

Very truly yours,

M & M RESTAURANTS, INC.

CLAUDE S. BREEDEN, JR.
Assistant Secretary

CSB/b

31 **Exhibit G-1**
[Un. Arb. Ex. 7]

12 December 1956

From: M & M Restaurants, Inc., Operators Naval Gun Factory Cafeterias

To: Board of Governors, Naval Gun Factory Cafeterias

Subj: Security Clearance—Rachel Brawner

It is requested that a meeting be arranged during the week January 7-11, 1957, for the purpose of a hearing relative to the denial of admittance to the Naval Gun Factory of Rachel Brawner.

It is further requested that in addition to those persons required by your Board and the Naval Gun Factory, Mr. Oliver T. Palmer and one associate be invited to attend this hearing.

M & M RESTAURANTS, INC.

CLAUDE S. BREEDEN, JR.
By direction

CSB/b

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32 **Exhibit H**
[Un. Arb. Ex. 8]

December 17, 1956

Mr. Claude S. Breeden, Jr.
Assistant Secretary
M & M Restaurants, Inc.
8th and M Streets, S. E.
Washington, D. C.

Dear Mr. Breeden:

This will acknowledge receipt of your letter of December 12, 1956 in which you advise us of your request for a meeting to be scheduled during the week of January 7-11, 1957

relative to the suspension of Mrs. Rachel Brawner on November 15, 1956.

We shall arrange to be present as soon as you notify us of the date of meeting. However, we will highly appreciate it if you will advise us, prior to the date, as to the purpose of the meeting and the procedure to be taken there.

Obviously we must know concerning the purpose and the procedure before we can finally determine the feasibility of participation. It should also be clear that any such participation is without prejudice to existing rights under the collective bargaining agreement.

Very truly yours,

OLIVER T. PALMER
Business Agent

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33 **Exhibit I**
[Un. Arb. Ex. 9]

M & M RESTAURANTS, INC.

January 10, 1957

Mr. Oliver T. Palmer, Business Agent
Cafeteria and Restaurant Workers Union
Local 473, AFL-CIO
1438 "U" Street, N. W.
Washington, D. C.

Re: Revocation of security badge issued to Rachel Brawner

Dear Mr. Palmer:

In reply to our request to the Board of Governors, U. S. Naval Gun Factory Cafeterias relative to a meeting regarding the denial of admittance to the Naval Gun Factory to Rachel Brawner.

We have been informed by the Superintendent, U. S. Naval Gun Factory via the Board of Governors, U. S. Naval Gun Factory Cafeterias, that such a meeting would serve no useful purpose and is therefore unnecessary.

The Superintendent's decision stated that it was considered that the subject cafeteria employee does not meet the security requirements and therefore entrance privileges to the Naval Gun Factory have been revoked.

At this point, we would like to state the position of M & M Restaurants, Inc. in this whole matter.

1. We are completely satisfied with the employment record of Rachel Brawner and consider her above average in the discharging of her duties.

2. The operation of the U. S. Naval Gun Factory food service by M & M Restaurants, Inc. is controlled by the Board of Governors, U. S. Naval Gun Factory Cafeterias. As a matter of proper business procedure a contract exists between M & M and the Board for the operation of the above mentioned food services. Contained in this contract are certain provisions which we feel you should be aware of:

(a) In no event shall the Concessionaire engage, or continue to engage, for operations under this agreement, personnel who fail to meet the security requirements under applicable regulations of the Activity, as determined by the Security Officer of the Activity.

34 (b) Any dispute concerning a question of fact arising between the Board and the Concessionaire under this Agreement which is not disposed of by mutual agreement shall be decided by the Commanding Officer of the Activity, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Concessionaire. The decision of the Commanding Officer shall be final and conclusive, unless determined by a court of competent jurisdiction to have been fraudulent or capri-

cious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence.

3. We feel that M & M Restaurants, Inc. has exercised every means available to them in bringing about a solution of this matter satisfactory to all concerned. The decision given by the Commanding Officer of the Naval Gun Factory must be accepted by M & M as the highest authoritative ruling available in this Activity.

In summation we would like to call your attention again that all personnel employed within the Naval Gun Factory must meet the security requirements under applicable regulations of the Activity, as determined by the Security Officer of the Activity. The Security Officer, not M & M, has established the security requirements and M & M is unable to state what composes these security requirements. For example, if M & M were to employ an individual to work in the cafeterias and when the individual applied to the Security Officer for permission to enter and leave the activity in the course of his normal duties, the Security Officer denied this permission then M & M would have no recourse but to terminate the individual. The security of the Naval Gun Factory is established and maintained by the activity and M & M Restaurants, Inc. must comply with existing regulations or else be required to withdraw from the activity.

Very truly yours,

M & M Restaurants, Inc.

Claude S. Breeden, Jr.
Assistant Secretary

CSB:mvb

35 **Exhibit J**
[Un. Arb. Ex. 10]

January 11, 1957

M & M Restaurants, Inc.
Naval Gun Factory Cafeterias
Eighth and M Streets, S. E.
Washington 25, D. C.

Attention: Mr. Claude S. Breeden, Jr.
Assistant Secretary

Dear Mr. Breeden:

We have your letter of January 10 concerning Rachel Brawner.

The parties have failed to reach agreement in connection with her discharge. Our Union accordingly requests that the dispute be referred to a Board of Arbitration pursuant to Paragraph 24 of the collective bargaining agreement between the parties. It is our position that Mrs. Brawner has been discharged without good and sufficient cause.

Our Union designates as its arbitrator on the Board Mr. Samuel H. Jaffee, 912 Dupont Circle Building, N. W., Washington 6, D. C.

Please acknowledge, and advise us who will act as the Company's designee on the Board and have said designee contact Mr. Jaffee for the purpose of selecting the third member of the Board of Arbitration.

Very truly yours,

OLIVER T. PALMER
Business Agent

36 **Exhibit K**

[Un. Arb. Ex. 11]

M & M Restaurants, Inc.

January 16, 1957

Mr. Oliver T. Palmer, Business Agent
Cafeteria and Restaurant Workers Union
Local 473, AFL-CIO
1438 "U" Street, N. W.
Washington 9, D. C.

Dear Mr. Palmer:

This will acknowledge receipt of your letter dated January 11, 1957 relative to the formation of a Board of Arbitration pursuant to Paragraph 24 of the collective bargaining agreement between M & M Restaurants, Inc. and Cafeteria and Restaurant Workers Union, Local 473, for further discussions in the Rachel Brawner matter.

The Company designates as its arbitrator on the Board Mr. Vinton E. Lee, Investment Building, N. W., Washington, D. C.

Very truly yours,

M & M Restaurants, Inc.

Claude S. Breeden, Jr.
Assistant Secretary

CC: Mr. Lee

CSB:mvb

38

Exhibit M

[Un. Arb. Ex. 12]

JAFFEE & DUNAU
912 Dupont Circle Building, N. W.
Washington 6, D. C.

COPY

January 30, 1957

Superintendent
Naval Gun Factory
M & Eighth Streets, S. E.
Washington, D. C.

Dear Sir:

This office represents Local Union No. 473, Cafeteria and Restaurant Workers Union, AFL-CIO. This Union has a collective bargaining agreement with M & M Restaurants, Inc., which operates the cafeteria facilities at your installation.

We are informed that on November 15, 1956, Mrs. Rachel Brawner, an employee of M & M Restaurants, Inc. at the Naval Gun Factory cafeteria and a member of the Union, was discharged by the employer because you or your security officer determined that Mrs. Brawner did not meet security requirements. As presently advised, we have been unable to ascertain under what authority, and in accordance with what procedure, that security determination was made. Would you therefore be good enough to apprise me of the statute, executive order, departmental regulation, and/or other basis pursuant to which this determination was made?

Would you also be good enough to furnish me with a copy of each source of authority upon which you rely, or give me a sufficiently full citation to it so that I may be able to obtain it elsewhere.

May I thank you now for your cooperation in this matter.

Very truly yours,

/s/ BERNARD DUNAU

D/c

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39 **Exhibit N**
[Un. Arb. Ex. 13]

U. S. NAVAL GUN FACTORY
Washington 25, D. C.

In reply refer to
A8-7
180:LJT:adn
Serial 0203

Feb 27, 1957

Jaffee and Dunau
912 Dupont Circle Building, N. W.
Washington 6, D. C.

Gentlemen:

Your recent letter requested information regarding the determination made by the U. S. Naval Gun Factory concerning Mrs. Rachel Brawner, an employee of the M & M Restaurants, Inc.

The written agreement entered into by the Board of Governors, U. S. Naval Gun Factory Cafeterias and M & M Restaurants, Inc. on 1 October 1955 specifies that the employees of the M & M Restaurants, Inc. who work in the Naval Gun Factory Cafeterias must meet the basic security requirements as regards entrance to the Naval Gun Factory. It was determined that Mrs. Rachel Brawner did not meet the basic requirements and thus her pass was revoked.

A copy of the agreement form used in connection with the contracting for a food services concessionaire is enclosed. Your attention is invited to paragraph 5 (b) (iii).

Sincerely yours,

/s/ D. M. TYREE
D. M. Tyree
Rear Admiral, USN
Superintendent
Naval Gun Factory

Encl.

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Exhibit O
[Un. Arb. Ex. 14]

JAFFEE & DUNAU
912 Dupont Circle Building, N. W.
Washington 6, D. C.

COPY

April 17, 1957

Admiral D. M. Tyree
Rear Admiral, United States Navy
Superintendent
Naval Gun Factory
Washington 25, D. C.

Re: An arbitration between M & M Restaurants Inc. and Local Union No. 473, United Cafeteria and Restaurant Workers, pertaining to the discharge of Mrs. Rachel Brawner

Dear Sir:

This letter is written to you on behalf of Local Union No. 473, United Cafeteria and Restaurant Workers Union, AFL-CIO, with respect to the above entitled matter.

You will please take notice that at 10:00 a.m., Thursday May 2, 1957, at the offices of the American Arbitration Association, 929 Pennsylvania Building, 425 Thirteenth Street, N. W., Washington 4, D. C., an arbitration hearing will be held before Judge Nathan Cayton pursuant to the collective bargaining agreement between M & M Restaurants, Inc. and Local Union No. 473 to arbitrate the question whether M & M Restaurants, Inc. discharged Mrs. Rachel Brawner on November 15, 1956 "without good and sufficient cause."

You are invited, personally or by a representative, to attend the hearing to state your position and present evidence in its support relevant to your part, or that of your subordinates, in causing Mrs. Brawner's discharge.

Very truly yours,

/s/ Bernard Dunau

D/c

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42 **Exhibit P**

AMERICAN ARBITRATION ASSOCIATION
VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of:

A dispute between M & M Restaurants, Inc., and one of its former employees, Rachel Marie Brawner, represented by Cafeteria and Restaurant Workers Union, Local 473 AFL-CIO.

Offices of American Arbitration Association, Pensylvania Building, Washington, D. C., Thursday, May 2, 1957.

The above entitled matter came on for hearing at 10:00 o'clock a.m., before the Arbitration Panel.

MEMBERS OF THE ARBITRATION PANEL:

NATHAN CAYTON, ESQ., Chairman
SAMUEL H. JAFFEE, ESQ., for the Union
JOHN B. CULLEN, ESQ., for the Company.

APPEARANCES:

BERNARD DUNAU, ESQ., appearing for the Union.
Mr. D. E. MCKAYE, President, M & M Restaurants, Inc., and Mr. HAROLD R. BAKER, Supervisor of M & M Restaurants, Inc., appearing for the Company.

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44 The Chairman: Mr. Baker, you are the Supervisor of the M & M Restaurants?

45 Mr. Baker: I supervise all the restaurants or

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cafeterias within the Naval Gun Factory.

The Chairman: How many are there?

Mr. Baker: There are three main cafeterias.

The Chairman: Which one are we dealing with?

Mr. Baker: We are dealing here with the Bellevue Annex Cafeteria.

The Chairman: Mrs. Brawner worked there for some six years approximately?

Mr. Baker: That is right.

The Chairman: You have heard the statement of Mr. Dunau that her competence was not in question, have you?

Mr. Baker: Yes, sir.

The Chairman: Will you tell us what happened in connection with her leaving the Company, and with what has been called her discharge?

Mr. Baker: On the day before the date in question.

Mr. Jaffee: November 14th?

Mr. Baker: November 14th, I received a call from the office of the Board of Governors, who have direct control of the cafeterias.

The Chairman: I don't want to keep interrupting you but I want a clear picture of all the people in official positions. The Board of Governors are civilian employees or military?

Mr. Baker: In this case they are a civilian board.

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The Chairman: All employed by the Naval Gun Factory?

Mr. Baker: All employed by the Naval Gun Factory. They are Government employees.

• • •

Mr. Cullen: You have a contract with the Naval Gun Factory, allowing you to conduct the business of the cafeterias?

Mr. Baker: Yes, sir.

46 Mr. Cullen: That contract is signed by the Board of Governors, is that correct?

Mr. Baker: That is correct. The Superintendent of the Naval Gun Factory appoints the Board of Governors to represent him and carry out the operation.

The Chairman: Who appoints them?

Mr. Baker: The superintendent of the Naval Gun Factory.

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Mr. Baker: On the 14th of November I received a call from Mr. Pyles, who is Secretary-Treasurer of the Board of Governors, and he told me that he was forwarding a letter to our office, directing us to have Rachel Brawner turn in her badge—that is her identification badge—which admitted her to the Naval Gun Factory; that there was a

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question of security clearance, and that the Security Officer was no longer going to let her have the badge.

He directed me to get the badge and turn it over to the Security Officer the next day.

• • •

Mr. Baker: The next morning, then, I called Mrs. Brawner and asked her would she come up to my office and see me. So when she came in, I told her what had happened, that is, as much as I knew about it, that I was directed to take the badge from her and return it to the Security Officer, and that is what I did, and she turned it over to me.

The Chairman: Do all the employees of the cafeterias have badges?

Mr. Baker: Yes, sir.

The Chairman: Those badges enable them to get into the job?

Mr. Baker: That's right.

The Chairman: Do they have to show their badge in order to go out?

Mr. Baker: That is right. It is an identification badge.

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47 The Chairman: What conversation did you have with her?

Mr. Baker: Of course, Mrs. Brawner was very upset, and of course she was surprised that such a thing would come up, as we all were. She asked me what she could do. I told her, if I were in her position. I would advise her to go immediately to the Security Officer and make a personal appeal to him as to what was happening in her case, and that that would be the normal thing to do, because I could not get any more information and I did not know any more about it; but I had been directed through Mr. Pyles to secure her badge and turn it back to the Security Officer, because they would no longer permit her to have security clearance.

I told her if she could not get any information on the situation from the Security Officer, that she had a right

to go to the Superintendent of the Naval Gun Factory, who is the highest authority, and to try to get some further information there.

* * *

The Chairman: Will all who are going to testify stand and raise their hands and be sworn?

(The following witnesses were sworn by the Chairman en banc:

Rachel Marie Brawner
Oliver T. Palmer
Denver McKaye
Harold R. Baker
Claude S. Breeden, Jr.)

48 The Chairman: I take it that the statement that you have just made, Mr. Baker, is true?

* * *

Mr. Baker: Yes, sir.

51 Mr. Dunau: I should like to ask whether there is anyone here from the office of the Superintendent of the Naval Gun Factory?

(No response.)

* * *

Rachel Marie Brawner,

was called as a witness by and on behalf of the Union, being previously sworn by the Chairman, was examined and testified as follows:

Direct Examination

* * *

By Mr. Dunau:

Q. Where do you live, Mrs. Brawner? A. 2342 Pomeroy Road, S. E.

Q. How old are you, Mrs. Brawner? A. 38.

Q. Are you married? A. Yes.

Q. Do you live with your husband? A. Yes.
Q. How man children do you have? A. Nine.

* * * *

52 The Chairman: How many?
The Witness: Nine.

By Mr. Dunau:

Q. What date were you discharged by the M & M Restaurants, Inc. A. November 15, 1956.
Q. Before you were discharged, how long had you worked for them? A. Six and one-half years.
Q. Where was the cafeteria located at which you worked? A. It was at Chesapeake and Overlook Drive.

* * * *

Q. Does that location have another name, Mrs. Brawner? A. Yes, Bellevue Annex.
Q. Are there a number of buildings in that annex? A. Yes.
Q. In what building is the restaurant located? A. Building 65.
Q. Is most of that building devoted to the cafeteria? A. Yes.
Q. What else is in that building? A. They have two offices inside.
Q. Do you know what goes on in those offices? A. No.
Q. What days of the week did you work, Mrs. Brawner? A. Monday through Friday.
Q. What were the hours of the day? A. 6:00 to 3:00.
Q. What was your job classification? A. Short order cook.
Q. Is there another name that that classification goes by? A. Breakfast cook.
Q. What was your hourly rate of pay? A. $1.18.
Q. At the cafeteria was there any other full-time employee who worked there with you?

* * *

53 A. Yes.

Q. What is her name? A. Mrs. Callahan.

Q. What is her job? A. Cashier.

Q. Did she sometimes do other work? A. Yes.

Q. What did she do? A. Sometimes she served coffee and cut pies.

Q. When you arrived for work at 6:00 in the morning, will you tell us what you did? A. First I would get my food out that I was going to have for breakfast, the eggs, bacon, sausage, meat, and prepare my pancakes, if I was going to have hot cakes, and mix the dough, and I would get my potatoes ready.

Q. Then what did you do after you had prepared to serve breakfast? A. I set up my grill and waited for my customers.

Q. At what time was breakfast service through? A. About 8:00 o'clock.

* * *

Q. After breakfast service was through then what did you do? A. Cleared my tables in the dining room, and washed

* * *

the dishes, and prepared for lunch.

Q. About what time was lunch service started? A. About 11:30.

Q. At about what time was lunch service through? A. 12:30.

Q. After you were through serving lunch, what did you do? A. Cleaned up, and most of the time prepared for the next morning, what I was going to have for breakfast, and if I was going to have potatoes, I would try to peel them, to have them ready for the next morning.

54 Q. After you had finished preparing whatever you could for the next morning's breakfast service, would you then go home? A. Yes.

Q. Mrs. Brawner, does this restaurant operate cafeteria style? A. Yes.

Q. Did you run the steam table at the cafeteria? A. Yes.

Q. Is this a busy restaurant? A. Yes, sir.

Q. Would you tell us about how fast the line moves in the restaurant? A. As soon as they pick up some thing, they go on.

• • •

That's all.

• • •

Q. Did you go into other buildings at the Annex? A. No.

• • •

Q. You were discharged, you say, on November 15, 1956? A. Yes, sir.

Q. Would you tell us what happened on that day? A. That morning I started to work as usual, and I had served the breakfast and was preparing my breakfast and Mrs. Callahan's, and Herbert come up.

Q. Who is Herbert? A. He is a truckdriver, and brought Hannah Cook with

• • •

55 Q. Who is Hannah Cook? A. She is another worker, and told me Mr. Baker wanted to see me, and to come to his office, and to have Hannah to work in my place.

Q. Who is Mr. Baker, Mrs. Brawner? A. Mr. Baker was my supervisor.

Q. All right. A. And I got my things out of my locker and told Hannah where to get different things to prepare for lunch, and what I had to serve, and where to find them, and I went with her over to Mr. Baker's office.

Q. When you got to Mr. Baker's office, did you see Mr. Baker? A. Yes.

Q. Would you tell us what conversation you had with Mr. Baker? A. Well, when I first went in, I sat down and Mr. Baker told me that he was sorry, that he had been told to pick up my badge, and I asked Mr. Baker what for, and he said: "For security reasons."

I said: "What about security? I haven't did anything. I don't know anything that I did."

And he said: "That's all I know, to pick up your badge."

I said: "What must I do or who do I see?"

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He said: "Write a letter to the Superintendent of the Yard." and he said: "I would"—well, he said if he were me, he would write a letter to the superintendent.

Q. Was anything further said? A. No. I turned my badge over to Mr. Baker, and he asked the clerk to write me a slip of paper to get out the gate, so that I could show it to the Marine on the gate?

Q. After you left the grounds, what did you do then? A. I thought I would go see Mr. Palmer.

Q. Mr. Palmer is the business agent of the local? A. Yes.

Q. Did you report to Mr. Palmer what happened?

56 A. Yes, I did. I told Mr. Palmer what had happened at the yard. Mr. Baker told me before it was something which happened in 1946. That is what Mr. Baker said. I was so upset I didn't know nothing, so when I got to the office Mr. Palmer asked me what had happened, and I told him, and I told him that it was something which had happened in 1946, and I couldn't remember, and Mr. Palmer asked me to check over in my mind. Had I ever been to any parties or ever subscribed to any magazines or papers or anything, and I told him that I got the Readers Digest, and he asked me had I ever been to any parties, and I said yes I had been to parties.

He said, had I ever saw the Daily Worker, and I

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said I had, and he said: "With who?"

I said: "With one of the girls who worked with me at Lansburgh's."

Q. When did you work for Lansburgh's? A. That was in 1946.

Q. In 1946? A. Yes, sir.

Q. What did you see in connection with the Daily Worker at Lansburgh's in 1946? A. I can't remember all that I saw in the paper but it was a regular newspaper to me.

Q. Did you see the paper in the possession of an employee at Lansburgh's? A. Yes, sir.

Q. What was the employee's name? A. Gladys Felder.

Q. Did you know anything else than that the employee, Gladys Felder, had the Daily Worker in her hand? A. No.

Q. Did you know if Gladys Felder was a Communist? A. No.

Q. Do you know whether she is a Communist? A. I do not.

Q. Did Gladys Felder ever ask you to engage in Communist activity?

• • •

57 A. No, sir.

Q. Did she ever ask you to join the Party? A. No.

Q. Did she ever discuss Communism? A. No.

Q. Do you know anything about Gladys Felder other than that you saw her one day with a Daily Worker in her hand? A. No, I don't.

Q. Did you at the time you saw Mrs. Felder with the Daily Worker know what it was? A. No, I didn't.

Q. What did you think it was? A. I tell you I thought it was a paper, something like a Union would put out, so far as the workers are concerned. That's what I thought it was.

Q. When did you first learn that the Daily Worker was a Communist newspaper? A. When I read in the paper about the Rosenbergs case, I saw something written up about the Daily Worker, and it come to me it was a Communist paper.

Mr. Jaffee: Are those the Rosenbergs who were executed some time later?

The Witness: Yes, sir.

• • • •

By Mr. Dunau:

Q. Mrs. Brawner, what do you read? A. Well, I read Good Housekeeping and I read Readers Digest, and I belong to the Condensed Book Club, and I get them every month.

Mr. Jaffee: Is that the Condensed Book Club put out by Readers Digest?

The Witness: Yes, sir, and I get Better Homes and Gardens and the Watchtower.

Mr. Jaffee: Is that Jehovah's Witnesses newspaper?

The Witness: Yes, sir.

By Mr. Dunau:

58 Q. Mrs. Brawner, do you read any daily newspapers? A. Yes.

Q. Which daily newspapers do you read? A. The News and the Star.

Q. Do you read the Washington Post? A. I don't get it.

Q. Mrs. Brawner, do you belong to a church? A. Yes.

Q. What church do you belong to? A. John Stewart Memorial.

Q. What religious denomination is it? A. Methodist.

Q. Do you attend church regularly?

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A. Yes, sir.

Mr. Dunau: I have no further questions.

The Chairman: What has been the extent of your schooling?

The Witness: Do you mean how far did I go in school?

The Chairman: Yes.

The Witness: To the eleventh grade.

The Chairman: Here in Washington?

The Witness: Yes, sir.

The Chairman: How long have you lived in Washington?

The Witness: Since I was about three, I suppose. I don't remember coming here.

• • •

By Mr. Dunau:

Q. Mrs. Brawner, what political party do you favor? A. The Democratic Party.

• • •

59 **Oliver T. Palmer,**

was called as a witness by and on behalf of the Union, having been previously duly sworn by said Chairman, was examined, and testified as follows:

Direct Examination

The Chairman: Give your full name, please.
The Witness: Oliver T. Palmer.

By Mr. Dunau:

Q. Where do you live, Mr. Palmer? A. 1829-13th Street, N. W., Washington, D. C., Apartment 303.

Q. What is your position with the Union? A. I am the Business Agent of the Union.

The Chairman: For how long, Mr. Palmer?

The Witness: I have been with the Union twenty years, but I have been Business Agent for the Union since 1943, fourteen years.

By Mr. Dunau:

Q. Mr. Palmer, you have seen, have you not, Union's Exhibits Nos. 2 through 11? A. I have.

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Q. Do they represent the substance of the Union's processing with the M & M Restaurants in this case? A. They do.

Q. Did you speak to Mr. McKaye, the President of M & M Restaurants, Inc., on November 20, 1956? A. I did.

Q. Where did that conversation take place? A. It was in Mr. McKaye's office at the Naval Gun Factory.

Q. Would you describe what that conversation was, please? A. After Mrs. Brawner's discharge, we contacted

Mr. McKaye by telephone and advised him we would like to discuss the matter with him, and we went down and he did receive us, and we did have a discussion about it.

Mr. Jaffee: May I interrupt? You say "we." Who is "we"?

The Witness: Mr. Bea and I.

Mr. Jaffee: What is his position?

The Witness: He is President of the Union.

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The Witness: We went down and had a discussion about it, and we were trying to find out what information we could get as to the discharge. We pointed out that under the terms of the contract that certainly we would like to

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have some information as to why Mrs. Brawner was discharged or was dismissed.

The only information that we were given was that they were advised by letter to take Mrs. Brawner's badge, and that had been done.

We said to McKaye: "We feel that under the terms of the contract that certainly the Company should at least give some reason or point out why, because it is all blank verse to us and we do not know anything."

Mr. Jaffee: Do you mean Paragraph 6 of the contract?

The Witness: Paragraph 6 of the contract, which was then in existence between us.

Mr. McKaye said he could not give us any information concerning it. We requested that some meeting be held so that we could ascertain. We made it clear to Mr. McKaye and his associates that certainly if there was anything established to substantiate that Mrs. Brawner had done anything which was subversive, that we were just as much interested at the Union as they were, and that if we could get some information of any kind which substantiated it, that we would be just as anxious to get Mrs.

Brawner out of the Union as they or as the Government was to get her out of the yard.

It developed and we stated to them that we thought

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it was their obligation, as the employer, and as a party to the contract, to give that kind of information to us or to seek to secure it.

Mr. McKaye said that they were in no position to seek anything, and that was all that was said. That is the sum and substance of it.

61 We pointed out that we had had other cases where employees were dismissed for security reasons, and we were given some information, and the employee was at least given an opportunity to defend herself. We said at least Mrs. Brawner should be entitled to a fair hearing or something should be done.

Then I left it with them to make every effort to try to see that that was done.

By Mr. Dunau:

Q. Mr. Palmer, you mentioned a meeting in your testimony. With whom was that meeting held, or to be held? You mentioned that you suggested to Mr. McKaye that a meeting should be held. A. With the Board of Governors. Mr. McKaye mentioned that they had received that letter from the Board of Governors, and we were very insistent upon it, that some meeting with the Board of Governors or with the authorities in the Navy Yard be held so that we could try to get some information as to why she was dismissed and why her security

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clearance was discontinued.

Q. Was any such meeting ever held? A. It was never held.

Following that conference, when we didn't seem to get any definite information that would lead us to believe or

think that anything could be done, we then wrote a letter on November 20th, protesting her discharge.

Mr. Cullen: Didn't the M. & M Restaurants attempt to set up that conference?

The Witness: Later on. They did write us a letter. They wrote us a letter and answered our letter, and when they answered our letter they indicated in that letter that there was an attempt to be made to set up the conference, and they sent us excerpts of the contract.

Then we replied to that letter and requested a copy of the operating contract, but we never received that, and we have never received it, other than it being introduced here today. We have never seen the contract.

62 Then after that Mr. McKaye had to go away on a vacation, I believe, and he went away on his vacation, and then we communicated with Mr. Breeden. After telephone conversations there was an agreement to our request for a meeting to be held. We replied to what they had sent us with a formal statement, and they said that they would attempt to arrange such a meeting in the week of January 7,

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1957, I believe.

We replied, and evidenced our desire and agreement to attend such a meeting and to participate in it.

Later on, I believe January 10th, we received a letter that the meeting would not be held.

By Mr. Dunau:

Q. Mr. Palmer, prior to the correspondence in this case, had you known of any provision in an agreement between the Restaurant and the Board of Governors, pertaining to the discharge of an employee for failure to meet clearance requirements? A. That was our first knowledge of any such provision.

Q. Prior to the time I showed it to you in my office, had you ever seen a copy of the agreement between the M & M

Restaurants, Inc., and the Board of Governors? A. I had never seen it, and no one connected with our Union had ever seen it.

Q. Had you ever known it existed? A. I did not.

Mr. Cullen: May I ask, Mr. Palmer, did you know at the time that all the employees were required to have a badge to enter the Navy Yard?

The Witness: We did know that.

Mr. Cullen: That is given by the Navy Yard and not the restaurant, is that correct?

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The Witness: We never knew how the badges were secured, Mr.—is it Mr. Cullen?

Mr. Cullen: Yes, sir.

63 The Witness: We never knew how to secure them.

The Chairman: You personally don't have a badge?

The Witness: I personally don't have a badge. When we go to the Navy Yard, we have to go through the office, and they call Mr. McKaye's office, and they give us a pass.

Mr. McKaye: So do I.

The Witness: When we send somebody there, the Company, as we understand it, secures a badge for them. That is to the best of our knowledge.

By Mr. Dunau:

Q. Mr. Palmer, how long has the Union been recognized as the bargaining agent for M & M Restaurants, Inc.? A. The Union was certified as collective bargaining agent as a result of an election conducted on July 15, 1942.

Q. An election conducted by whom? A. The National Labor Relations Board.

Q. Were you thereafter certified by the National Labor Relations Board? A. We were.

Q. Do you recall the date of the certification? A. To the best of my recollection, in 1942. You generally get certification within ten days, and I believe

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it was within ten days or two weeks.

Q. Who was operating the cafeterias at the Naval Gun Factory at the time of certification? A. At the time of certification the operation at that time was by Miss H. K. Dickson.

Q. Did you have agreements with Miss Dickson? A. Yes, sir, we did.

Q. collective bargaining agreements? A. Collective bargaining agreements.

Q. When did M & M Restaurants take over from Miss Dickson? A. M & M took over in March of 1947. I believe that is the correct date.

64 Q. Have you had any collective bargaining agreements with M & M Restaurants since that date? A. We have.

Q. Did each of the agreements which you had with M & M contain the provision that employees should not be discharged except for good and sufficient cause? A. They did.

Q. Has the agreement which is in evidence in this case since expired? A. It has.

Q. Have you consummated another agreement with M & M? A. We have.

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Q. Has it been executed yet? A. Not as yet.

Q. I notice the agreement in evidence as Union's Exhibit No. 1 lists the Union as Local 471. Will you explain how the designation "471" was changed to "473"? A. The designation of the Union was changed in January 1956. Our Union at that time was an independent Union, when the last agreement referred to was consummated. Since then, in January 1956, we affiliated with the Hotel and Restaurant Employees and Bartenders International Union, which is an international union, and we were unable to keep No. 471 because another local union had No. 471, so we had to take the nearest to it, and 473 was the nearest to it, and we chose the No. 473.

Mr. Jaffee: That is a part of the AFofL-CIO?

The Witness: That is a part of the United Labor Movement, AFofL-CIO.

By Mr. Dunau:

Q. Mr. Palmer, except for the affiliation with the AFofL-CIO, was there any change effected in the Union in January 1956? Is it the same Union? A. It is the same Union.

Q. Has the Union and M & M Restaurants, Inc., continued to operate under this contract since the affiliation?

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A. We have.

Q. Mr. Palmer, how many employees does the Union represent in the District of Columbia area?

A. Approximately 2,600.

Q. With what type of employers do you have collective bargaining agreements? A. We have collective bargaining agreements with the major operators of all Government cafeterias, Government Services, Incorporated, being the largest operator. The Pentagon, which is operated by the Knott Catering Corporation, and prior to the Knott Catering Corporation, which was the operator since October 1, 1956 of the Pentagon, and prior to that it was the National Food Corporation, and we had an agreement with the National Food Corporation since March 1944.

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The Witness: We have contracts with the Welfare and Recreation Association of the United States Department of Agriculture, and they operate the Agriculture cafeterias at Log Lodge at the plant in Maryland which is in the vicinity of Laurel, Maryland, and we represent commercial cafeterias.

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We represent the employees of the S & W Cafeteria, Allies Inn, the Greystone Cafeteria, the Chamberlin Cafeteria, and the maintenance and cafeteria employees of

the YWCA at 17th and K Streets, N. W.; the Methodist Cafeteria, which is at 100 Maryland Avenue, N. E.; the Latch String Cafeteria, 612-12th Street, N. W.; and also the employees of Kann's Luncheonette, in the department store.

Q. Mr. Palmer, can you give us an approximation of the percentage of employees that work in Government cafeterias and what percentage work in the commercial restaurants, the percentage of the people referred to? A. Percentagewise, in the Government cafeterias we represent approximately 2,000 workers.

Q. Then, as I understand it— A. The bulk of our membership is in the Government cafeterias.

Q. I believe you said you represented 2,600 employees? A. That is correct.

66 Q. So about 600 would be employed in commercial restaurants? A. That's right.

Q. That is restaurants which are not operated as Governmental cafeterias? A. That is right.

Q. Would you tell me whether an employee who has

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been discharged as a security risk from one Governmental cafeteria would be able to obtain employment in another Governmental cafeteria? A. An employee who may be discharged as a security risk has not a ghost of a chance of getting a job in a Government cafeteria, and it is very difficult to obtain employment for any employee who has that tag on them, in any cafeteria. That is a problem, and if they have that tag, it is almost impossible to find them another job.

Q. Mr. Palmer, do you know an employee named Esther Mae Thompson? A. I do.

Q. Where does Esther Mae Thompson work? A. She works on the beverage bar at the Department of Defense. That is one of the beverage bars which is operated in the Pentagon Building by the Knott Catering Corporation.

Q. Had the employee been discharged—you say it is

operated by the Knott Catering Corporation? A. Yes, sir.

Q. And who was the predecessor of the Knott Catering Corporation? A. The National Food Corporation was the predecessor.

Q. Was the National Food Corporation required to discharge this employee by the Security Officer at the Pentagon as a security risk?

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A. The Company was required to dismiss her.

Q. Was that dismissal arbitrated? A. It was.

Q. Did the arbitration result in an award requiring that the employee be put back to work? A. The award was handed down on May 17, 1955, to the best of my recollection, and the award of the Arbitrator was that she be reinstated in her job, with full back pay.

67 Q. Was she reinstated pursuant to that award? A. She was.

Q. Is she still working at the Pentagon? A. She is still working at the Pentagon.

Mr. Jaffee: Did she get the back pay, too?

The Witness: She did get the back pay.

The Chairman: How long ago was it, Mr. Palmer?

The Witness: Your Honor, she was dismissed on August 9, 1954, and the case was heard, I believe, in April of 1955, and the award was made May 17, 1955. I believe that is correct. That may not be just exactly correct but I believe it is almost correct.

Mr. Cullen: Was she required to have a badge?

The Witness: At certain times they are.

Mr. Cullen: How did she get the badge back?

The Witness: At certain times they are required to have badges and there are certain employees who during

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certain hours of the day do not have badges, but all the employees who work there have to have passes. They gave

her her pass. Every employee who works there has to have a pass, and it is one of the strict security regulations.

Mr. Cullen: What I am trying to find out is, how did they, as the result of an arbitration award, compel the Government agency to readmit her?

The Witness: Mr. Cullen, I could only reply to you that she was reinstated and her pass was restored. That is the only answer I could give.

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Mr. McKaye: Make the date September 1946 that we took over the cafeteria.

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68 By Mr. Dunau:

Q. Mr. Palmer, in a restaurant which is run cafeteria style, how many customers pass through the line per minute ordinarily?

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A. Well, the ratio which they expect in Government cafeterias is generally six to the minute.

Q. About six to the minute? A. Yes, sir. If the line is not going—Sometimes they get seven or eight through, but at least six.

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The Chairman: Mr. Palmer, you just told us about the case of Esther Mae Thompson.

The Witness: Yes, sir.

The Chairman: Earlier you told us there had been other instances like this, either in this Union or in the Gun Factory.

The Witness: Maybe you misunderstood.

The Chairman: Were the discharges, as you call them, for security reasons?

The Witness: I said in my recollection that was the one particular instance.

The Chairman: Is that the only one you remember?

The Witness: This is in fact the second one we have had.

The Chairman: Then there was the National Food case and this one?

The Witness: Only these two.

The Chairman: Aside from this one, you have no

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knowledge of any other discharges for security reasons?

The Witness: No, these are the only two, the one that I mentioned, Mrs. Thompson, and this one.

Mr. Jaffee: If there were others, is the nature of your work with the Union such that you would know about them?

The Witness: Most assuredly so.

The Chairman: There would not be any discharges or separations except those which you would know about?

69 The Witness: That is precisely correct.

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Mr. Cullen. In your conference with Mr. McKaye, Mr. Palmer, did he tell you exactly what had happened, that is, that he had had to pick up the badge?

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The Witness: He related it to us.

Mr. Cullen: Did he tell you that he was dissatisfied with Mrs. Brawner's work at all?

The Witness: He did not.

Mr. Cullen: Did he tell you at that time that if she could get the badge back, she could have her job back?

The Witness: Naturally, if he was not dissatisfied, he would employ her in that case.

Mr. Cullen: You knew that, in other words?

The Witness: I accepted that as a foregone conclusion.

Mr. Cullen: The only thing preventing her from working was her inability to get or to have a badge?

The Witness: Mr. Cullen, from our point of view, our contention was that in order to constitute good and sufficient cause, the provision of the contract was such that there was a sanctity to that provision, and there was a

responsibility on both parties as parties to that contract, when these things occur, to at least see that an employee gets a fair hearing, and that was all we were contending.

Mr. Cullen: Did you tell us that they were getting a hearing from the Board of Governors?

70 The Witness: According to the communication which we had, but unlike in the Department of Defense, where we had some information on which to proceed, they didn't just

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say to Miss Thompson: "We have to take your pass. Give us your pass," but they gave a memorandum on the situation, a memorandum of particulars, so to speak.

Mr. Cullen: Didn't Mr. McKaye or Mr. Breeden tell you that they had no information other than that they were told to pick up the badge, and they couldn't give you any reasons? Didn't they tell you that?

The Witness: They told us that, and that is all we knew.

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75 Mr. Cullen: Mr. Baker, do you have the original letter from the Board of Governors, requesting you to pick up this badge?

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Mr. Cullen: That is the letter saying what was done. Do you have the letter from the Board of Governors?

You stated before, Mr. Baker, that you received a telephone call.

Mr. Baker: Yes, sir.

Mr. Cullen: And also that he was writing a letter to you.

Mr. Baker: That's right.

Mr. Cullen: Do you have that letter?

Mr. Baker: This letter is addressed to M & M Restaurants, being dated the 16th of November.

Mr. Cullen: That tells what was done, and that also includes in it the fact that you did pick it up?

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Mr. Baker: That is right.

Mr. Cullen: Did you ever receive a letter from them?

Mr. Baker: Maybe I misunderstood you, or I said it in the wrong way. Mr. Pyles told me the direction he had received from the Security Officer, and he said he would follow with a letter written to us, and he would substantiate what he was telling me.

76 The Chairman: Did he follow with such a letter?

Mr. Baker: This is the letter here.

The Chairman: The first notice was November 14th?

Mr. Baker: Yes, sir.

The Chairman: By telephone?

Mr. Baker: Yes, sir.

The Chairman: It was not by letter?

Mr. Baker: No, sir, it was a telephone call.

The Chairman: From whom?

Mr. Baker: From Mr. Pyles, and the reason for the call was this, Your Honor:

The Security Officer had certainly called Mr. Pyles, from the conversation between Mr. Pyles and myself, and he asked me to get the badge, or would the Security Officer to better able to handle it by going down there with security police and getting the badge themselves.

I said: "Certainly, so far as the employee goes,

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it would be much less embarrassing to have me handle it," and that if I could, I would do it.

He said: "Suppose you do it, and I'll follow with a letter to you to substantiate what I'm telling you," and that is the way we handled it.

The Chairman: Did Mrs. Brawner surrender the badge to you?

Mr. Baker: Mrs Brawner surrendered the badge to me.

The Chairman: And you in turn surrendered it to the Security Officer?

Mr. Baker: That is correct, he directed me to take it to the Security Officer.

The Chairman: On the 15th or 16th?

Mr. Baker: The 15th.

The Chairman: 15th of November 1956?

Mr. Baker: Yes, sir.

Mr. Dunau: Since the letter is so short, and we do not have copies of it, I might as well read it into the record.

The Chairman: Very well.

77 Mr. Dunau: This is on the letterhead of the Board of Governors of the Naval Gun Factory cafeterias, U. S. Naval Gun Factory, Washington 25, D. C.

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"B.G.:HRP:mar
Ser 0085
16 November 1956

"MEMORANDUM

"From: Board of Governors, Naval Gun Factory Cafeterias

"To: M & M Restaurants, Inc.

"Subj: Rachel Brawner

"1. The Board was notified on the afternoon of November 14, 1956 by LCDR H. C. Williams, Security Officer, Naval Gun Factory, that Rachel Brawner, head steam table employee, presently working at the Bellevue Cafeteria, would have to surrender her Naval Gun Factory badge and would not be permitted to enter the Naval Gun Factory until clearance is certified by the Security Officer.

"2. This office immediately contacted Mr. Baker and requested to return the badge. Rachel Brawner's badge was returned to the Security Officer on 15 November 1956.

"H. R. PYLES
Secretary-Treasurer."

The Chairman: We will mark that as Company's Exhibit No. 1.

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78 Mr. Dunau: The document which has been marked Company's Exhibit No. 2 reads as follows:

"185:HWW:mh
Ser 5437
Jan 8—1957

"From: Superintendent, U.S. Naval Gun Factory

"To: Mr. E. C. Lynch, Chairman, Board of Governors, Naval Gun Factory Cafeterias

"Subj: Rachel Brawner (Cafeteria Employee); revocation of security badge

"Ref: (a) Board of Governors, NGF Cafeterias ltr Ser 0102 of 13 Dec 1956 with 1st End thereto

(b) Agreement for Food Services Concessionaire between Board of Governors, U.S. Naval Gun Factory and M&M Restaurant, Inc. of 1 October 1955 (NavExos 3732 (4-55))

"1. By reference (a), the Chairman of the Board of Governors, Naval Gun Factory Cafeterias, requested that a

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meeting be arranged, participants consisting of the Naval Gun Factory Security Officer, members of the Board of Governors, representatives of M&M Restaurants, Inc. and agents of the Restaurant Employees Union to discuss the action relative to the denial of admittance to the Naval Gun Factory of Rachel Brawner. a cafeteria employee.

"2. Paragraph 5(b)iii of reference (b) stipulates that the contractors will employ only those who meet the security requirements for admission to the Naval Gun Factory. It is considered that the subject cafeteria em-

ployee does not meet these security requirements and therefore entrance privileges to the Naval Gun Factory have been revoked.

"3. It is considered that the above decision is proper in this case and that the meeting proposed in reference (a) would serve no useful purpose and is therefore unnecessary.

"D. M. TYREE
"Enclosure (1)"

79 The Chairman: You may read the second letter.

Mr. Dunau: The letter marked Company's Exhibit No. 2-A reads as follows:

"BOARD OF GOVERNORS
NAVAL GUN FACTORY CAFETERIAS
U. S. Naval Gun Factory
Washington 25, D. C.
Lincoln 3-0014

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"B.G.:HRP:mey
Ser 0002
9 January 1957

"MEMORANDUM

"From: Board of Governors, Naval Gun Factory Cafeterias

"To: M & M Restaurants, Inc.

"Subject: Rachel Brawner, Cafeteria Employee; security clearance for

"Ref: (a) M & M Restaurants, Inc. ltr of 12 Dec 1956 to Bd of Gov

"Encl: (1) Copy of Superintendent's ltr 185/Ser 5437 of 8 Jan 1957 to Bd of Gov

"1. A meeting was requested by reference (a) for the purpose of a hearing relative to the Security Officer with-

drawing the security clearance of one of your employees, Rachel Brawner.

"2. A meeting was requested by the Board of Governors, Naval Gun Factory Cafeterias. The Superintendent, Naval Gun Factory forwarded the answer contained in enclosure (1) which is self explanatory.

"(Signed) T. P. Sarelas
T. P. SARELAS
Vice-Chairman."

Mr. Cullen: Mr. Baker, will you tell us again, please, the conversation which you had with Mrs. Brawner on that morning?

Mr. Baker: Yes, sir. When Rachel arrived in my

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office—I think she said the same thing—I told her I was sorry but I had to take such an action in her case, and that I had word through the Security Officer that I would have to take up her badge.

Of course when I told her that, naturally it upset her a great deal. Then she questioned me as to what it
80 was, or what the reason for such an action was. I could not tell her anything except I had been directed to take such an action.

Then I advised her. She asked me what she could do, and, as I say, she was upset, and she asked what she could do, and I tried to explain to her the several steps which I thought might be possible for her to follow, including going to the Security Officer himself, and to the Superintendent, and of course I also told her to see Mr. Palmer, her business agent.

Mr. Cullen: Did the Security Officer give you any reason at all, when he told you to pick up the badge, or were you given any reason?

Mr. Baker: No, I had not talked to the Security Officer prior to getting the badge. I did not talk to him.

Mr. Cullen: Did you ever talk to him after that?

Mr. Baker: After that, I did. When I returned the badge to him.

Mr. Cullen: Did he give any reason for it?

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Mr. Baker: No, sir, he did not, except to say that he could not allow her to continue the privilege of having the badge, that her security was in question.

Mr. Cullen: At no time did the Board of Governors or the Security Officer give you any reason for the action?

Mr. Baker: No, sir, they did not explain the reason, other than security.

Mr. Cullen: I will ask you again to back up what Mrs. Brawner said. Her work had been satisfactory?

Mr. Baker: Oh, yes, and I think she asked me at that time—of course it has been several months and I can't recall word for word, but Mrs. Brawner and I discussed it, and I had never had any quetsion about her ability or qualifications, and I pointed that out to her at that time, and there was no question about her work, and she was satisfactory, so far as the Company was concerned, and I told her that I regretted having to do such a thing.

After all, like many of our employees, she had problems at different times, that she would come to me with, and naturally we would come in contact with her throughout the day, at different times, in connection with the work, and I can say we had no question of her ability or qualifications to do the job.

81 Mr. Cullen: If she is able to obtain her badge or

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security clearance, she can have her job back?

Mr. Baker: Immediately.

Mr. Cullen: In your discussions with the Board, either through Mr. Pyles, or his assistant, was there anything said to you about the conditions or terms of your contract with the Yard?

Mr. Baker: The only reference which was made to our contract, when Mr. Pyles talked to me on the telephone the day before the action took place with her badge, he told me then that under the contract he was following through on that provision. He said: "If you are going to have a question about it, that will answer your question right there."

Mr. Jaffee: That was the concessions contract?

Mr. Baker: Yes, sir, that's right.

Mr. Cullen: Mr. Breeden, do you have anything to add to help us with regard to these conferences with Mrs. Brawner or anything else.

Mr. Breeden: Nothing except what was relayed to me when Mr. McKaye left, I took over the correspondence and telephone calls with Mr. Palmer, in an attempt to arrange a meeting for clarification of it, and, as Mr. Palmer stated, we were not successful, and we got a ruling from the Superintendent of the Yard, stating his opinion.

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82 The Chairman: Mr. Baker, I don't have Mrs. Brawner's exact words but you told her that the question about her security status had something to do with something which happened in 1946. Did you have that conversation with her?

Mr. Baker: When she was in my office, and she was questioning me as to what might be in the background as to security, when we were taking her badge, I told her I had no information other than what I have already stated and I told her I had no idea really and I could not give her anything.

I said: "Of course, when you sign an application for admittance to the Naval Gun Factory, the security checks start at that time."

That is, each employee who is employed by the Gun Factory, or by us, in the screening provision they make an application to the Security Officer for an identification

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83 badge.

The Chairman: Is there available to us, or can you make available to us, putting this question generally, a copy of that form of application?

Mr. Baker: Yes, I think it can be made available. The Naval Gun Factory has its forms on hand. Let me say that. They are there.

The Chairman: I will put it this way: Will you attempt to get one for us?

Mr. Baker: Yes, sir.

The Chairman: Have you ever had an instance where an application of that kind had been rejected in advance of employment?

Mr. Baker: Several times.

The Chairman: I mean for security reasons.

Mr. Baker: Not for security reasons. On the application, Your Honor, one part of the application deals with criminal record, and of course it verifies that on one part of the statement, that you shall answer all the questions to the best of your knowledge truthfully. Where it deals with the criminal record it says: "List arrests, if any," and where that has come up and where someone has put down a criminal record, they would not accept them for employment.

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Mr. Cullen: Who first brought up the question of 1946?

Mr. Baker: In our discussion with Mrs. Brawner when she was in my office, I referred back to the time when she started with M & M, and came to the Gun Factory, and I think I told her in her security check, it would not necessarily show it started from that day she started with us, but they would go back to her whole history, her whole working time. I do not think I named the date but I think I said they could go back to 1945 or 1946, wherever you had your first job.

In other words, in general conversation I could have

brought up the date 1946 or 1945 in the matter of just talking with her.

Mr. Cullen: You have no knowledge of anything specifically happening to her?

84 Mr. Baker: I have no knowledge of anything relating to her within that time.

The Chairman: Turning now to Mrs. Brawner, I think the question has been put already but let us ask it again: Have you ever been arrested for any crime in the District of Columbia, or elsewhere?

Mrs. Brawner: No, sir.

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The Chairman: Are you living with your husband?

Mrs. Brawner: Yes, sir.

The Chairman: What is his employment?

Mrs. Brawner: He works at the Bureau of Engraving and Printing.

The Chairman: How long has he worked there?

Mrs. Brawner: About ten years. He has been in the Government seventeen years.

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85 Mr. Cullen: Mrs. Brawner, did you have any conversation, or any personal interview, with anybody in the Yard at the time you got this job?

Mrs. Brawner: Yes, sir.

The Chairman: On the chance that that form may not be made available to us, if everybody is willing, perhaps Mrs. Brawner can reach back in her memory and tell us what the questions were which were put to her.

Do you remember that application, Mrs. Brawner? Not the application of the M & M but the Security Officer application to the Gun Factory?

Mrs. Brawner: I remember once going to the Fifth Floor, and I believe Mr. Baker was with me, and there was another person who went in there, and they took the

fingerprints, but I can't think of all the questions they asked.

86 The Chairman: Did they ask questions verbally?

Mrs. Brawner: Yes, sir.

The Chairman: Was it from a form?

Mrs. Brawner: I don't remember a form but I remember they asked if I had any identification like moles on my face, and they took my fingerprints, but other than that, I don't remember.

The Chairman: You do not remember what the questions

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were?

Mrs. Brawner: No, sir.

The Chairman: That is, if you did fill out a form?

Mrs. Brawner: That is right.

The Chairman: Do you remember any questions they asked you dealing with your past security or loyalty record?

Mrs. Brawner: I remember that, yes. I remember, like Mr. Baker said: "Have you ever been arrested for anything?" and I said no, I hadn't.

Mr. Jaffee: Did you answer all the questions truthfully?

Mrs. Brawner: Yes, sir, I didn't have no reason not to.

Mr. Jaffee: I would like to ask Mr. Baker one question. Since you say Mr. Baker represents M & M, he should know whether she ever did this, and I assume I am safe in saying that so far as Mrs. Brawner's security and loyalty are concerned,—and I think those terms, it should be explained, are being used in their broadest aspect now —you never heard any question about it until this thing arose?

Mr. Baker: None whatsoever.

I might clarify that. On this application we have been referring to, it is a mimeographed form, made up by the Security Officer of the Naval Gun Factory. They screen

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two types of employees through the security office. First they screen Government employees, or people who are making application for Government work, and who fill out Government Form 53, and those people use a different form. Form 53 is for a Government employee, on a
87 Civil Service form. The other people going to work in the Naval Gun Factory, like for us in the restaurants or the cafeterias, or the officers' mess, or the Navy Exchange Store—in other words, there are several different types of activities that employ civilians, but are not Government employees, and those people are referred to as non-sponsored employees, and the Naval Gun Factory uses its own paper and processes them on that type of form. It is not a very extensive type of application and has only a few questions relating to general information about the person filling out the form.

Mr. Jaffee: Was Mrs. Brawner a Government employee?

Mr. Baker: She was not.

The Chairman: She was a non-sponsored employee?

Mr. Baker: I got it wrong. It is a sponsored employee. They used to call them "non-Government," and now it is "sponsored."

The Chairman: A sponsored employee is somebody like Mrs. Brawner, who works for an organization like yours, within a Government area?

Mr. Baker: Yes, sir, and the form was concerned

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with the address, relatives living within this country, and relatives living abroad, military service, if any, and police service, if any, and to list the names of clubs, fraternities or organizations of which you might be a member. It is a very small form.

Mr. Cullen: May I ask Mr. McKaye, so far as you know, do these other organizations within the Gun Factory, that is those running the officers' exchange and others listd, have the same form of contract with the Board of Governors that you have?

Mr. McKaye: First of all, the Board of Governors' complete name is the Board of Governors of the Naval Gun Factory Cafeterias. That is all they deal with. Of course the Officers' Mess is run by the Board of Officers in the Naval Gun Factory.

Mr. Jaffee: Was the Board of Governors—with the rest of the name you mentioned—appointed by the Superintendent?

Mr. McKaye: That is right, they are supervisory people, appointed by the Superintendent.

88 The Chairman: How many on the Board, if you know?

Mr. McKaye: There are seven, sir.

This form which is being used now for our employees, where they use it to get the badge for admittance, has it been changed in the past two years?

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Mr. Baker: I do not believe it has at any time.

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Mr. Dunau: Will you answer this, Mr. Baker: Does Mrs. Brawner have access to classified information?

Mr. Baker: I hardly think so.

Mr. Dunau: Do you have access to classified information?

Mr. Baker: No, sir.

Mr. Dunau: When you discussed with Mr. Pyles—isn't that his name?

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Mr. Baker: Yes, sir.

Mr. Dunau: And when he told you that he had been instructed to see that the badge of Mrs. Brawner was lifted, instructed by the Security Officer, he also told you, as I understand it, that if a question were asked of you, you could point to the provisions in the concession agreement as authority for such action. Is that correct?

Mr. Baker: I told Mr. Pyles I would have to take it up with Mr. McKaye, who is the President of the Company, and of course my superior. When I pointed that out he said: "You just tell Mr. McKaye I am acting under the security provision of the contract between us."

Mr. Dunau: Did you at that time suggest to Mr. McKaye that you had an obligation under the collective bargaining agreement?

Mr. Baker: We certainly discussed it.

Mr. Dunau: Did you suggest it to Mr. Pyles?

Mr. Baker: That was part of the reason for him coming back to me with such an answer, sir.

Mr. Dunau: You did tell him that notwithstanding the concession agreement, there was another agreement within the picture, that you were required to live up to?

Mr. Baker: He was perfectly aware of it. He knows we have an operating contract with the local union.

Mr. Dunau: Did he suggest any reason why the

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concession agreement should be given precedence over the collective bargaining agreement?

Mr. Baker: No, he did not specifically, except to say that he had been directed—and of course the civilians in the Naval Gun Factory take orders from the military, and there is never any question about that.

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Summation on Behalf of the Company

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The Chairman: Some of this we will be discussing as a Board of Arbitration, but, nevertheless, since you are outlining your position, I must tell you something which concerns me is, what opportunity did this woman have to state her case or to obtain any information, or get any clarification of the reason for the picking up of her badge,

which is of course the pivotal or crucial step in this whole proceeding?

All she was told was "surrender your badge," and despite efforts by the Union, and by the Union counsel, to this day she has not been told what the charge is against her.

Mr. Cullen: And efforts by the employer also, I might add.

The Chairman: Not only was there no hearing or no clarification or no specification, but not even a statement on which the ultimate conclusion was reached. It was just said that she was not satisfactory from a security standpoint, which may mean anything.

* * *

102 Mr. Cullen: * * *

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103 Our position is heartily in accord with the viewpoint of the Union on this, and we are in entire agreement and we hold no brief for the Security Officer's actions, but can those actions be imputed to the employer?

* * *

108 (Whereupon, at 1:50 o'clock p.m., Thursday, May 2, 1957, the hearing in the above entitled matter was closed.)

118 **Exhibit S**

AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

CAFETERIA AND RESTAURANT WORKERS, LOCAL NO. 473,

and

M & M RESTAURANTS, INC.

AWARD OF ARBITRATORS

NATHAN CAYTON and JOHN B. CULLEN, constituting a majority of the Board of Arbitrators herein, and having been designated in accordance with the Arbitration Agreement entered into by the above named parties and dated March 15, 1954, and the Impartial Arbitrator, NATHAN CAYTON, having been duly sworn, and the said Board of Arbitrators having duly heard the proofs and allegations of the parties, and having examined the stenographic transcript of the testimony herein and the various Exhibits introduced into evidence by the parties, AWARD, as follows:

1. Rachel Brawner was not discharged without good and sufficient cause, and the relief requested by the Union in the Demand for Arbitration herein, dated February 1, 1957, is hereby denied.

2. The costs of these proceedings, including the fee of the Impartial Arbitrator, and the administrative fees of the American Arbitration Association, and any other expenses of the Arbitration, are to be borne equally by the parties.

One member of the Board of Arbitrators, SAMUEL H. JAFFEE, appointed to the Board by the Union herein, dissents from this Award.

/s/ NATHAN CAYTON
Nathan Cayton, *Impartial Arbitrator*

/s/ JOHN B. CULLEN
John B. Cullen, *Arbitrator*
Appointed by the Company

Dated: July 17, 1957

DISTRICT OF COLUMBIA ss:

On this 5th day of August, 1957, before me personally came and appeared Nathan Cayton and John B. Cullen, to me known and known to me to be the individuals described in and who executed the foregoing instrument and they acknowledged to me that they executed the same.

/s/ ROSE M. DAVIS [sp?]
Notary Public

My Commission expires May 14, 1960

Case No.L-18508; WASH L-1-57

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119 AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR
VOLUNTARY LABOR ARBITRATION TRIBUNAL

Case No. L-18508; WASH L-1-57

In the Matter of the Arbitration between

CAFETERIA AND RESTAURANT WORKERS, LOCAL 473

and

M & M RESTAURANTS, INC.

OPINION AND AWARD

For more than six years Rachel M. Brawner had worked for M & M Restaurants, Inc. (hereinafter referred to as the Company), as a short-order cook or breakfast cook, in a cafeteria within the grounds of the Naval Gun Factory in the City of Washington.

A Board of Governors, appointed by the Superintendent of the Naval Gun Factory, represents the Superintendent in controlling the operation of this and two other cafeterias maintained by the Company at the Gun Factory. The Concessionaire agreement is between the Company and the Board of Governors.

On November 14, 1956, the Secretary-Treasurer of the Board of Governors notified the Company supervisor by telephone that the Security Officer of the Naval Gun Factory had demanded that Rachel Brawner turn in her identification badge because "there was a question of security clearance". (All persons must have and show such badge in order to be permitted to enter or leave the grounds.)

The next morning the Company supervisor told Mrs. Brawner what had happened. She was "very upset" and "surprised that such a thing would come up", and disavowed any act which might ever have given rise to a question as to her right to security clearance. She handed her badge to the supervisor who in turn surrendered it to the Security Officer. The following day, November 16, 1956, the Board of Governors wrote to the Company that Mrs. Brawner's badge had been turned in and that she "would not be permitted to enter the Naval Gun Factory until clearance is certified by the Security Officer".

At the request of the Union, the Company requested the Board of Governors, in writing, to arrange a meeting "for the purpose of a hearing relative to the denial of admittance to the Naval Gun Factory of Rachel
120 Brawner", and also requested that two representatives of the Union be invited to attend the meeting. The Superintendent of the Gun Factory replied that such a meeting "would serve no useful purpose and is therefore unnecessary". No reason has been given then or since, for refusing security clearance to this employee.

Treating the situation as one in which an employer has discharged an employee without cause, the Union, after an exchange of letters with the Company, demanded arbitration on January 11, 1957.

On January 30, 1957, the Union's attorney wrote to the Superintendent of the Naval Gun Factory asking for information as to the authority for the action taken against

Mrs. Brawner. On February 27, 1957, the Superintendent replied that the Concessionaire Agreement specified that the employees of the Company "who work at the Naval Gun Factory cafeterias must meet the basic security requirements as regards entrance into the Naval Gun Factory. It was determined that Mrs. Rachel Brawner did not meet the basic requirements and thus her pass was revoked."

On April 17, the Union's attorney wrote to the Superintendent to apprise him of the date of the arbitration hearing and invited the Superintendent "personally or by a representative to attend the hearing to state your position and present evidence" relating to the situation. The invitation was not accepted.

A hearing was had and testimony taken by the Arbitrators on May 2, 1957. Briefs were later submitted by counsel.

Position of the Union

The arguments advanced by the Union may be summarized as follows: that Mrs. Brawner was discharged by the Company; that the discharge was "without good and sufficient cause" under the collective bargaining agreement between Company and Union; that the Security Officer of the Gun Factory had no legal authority to take away Mrs. Brawner's badge or bar her from the grounds; that when the Company entered into the Concession Agreement with the Board of Governors and agreed not to engage or keep employees who fail to meet security requirements, it violated the Company-Union contract, because under the National Labor Relations Act, it was the duty of the Company to bargain exclusively with this Union in respect to working conditions, including discharges; that reliance upon the Security Officer's invalid action furnishes
121 the Company no defense to its discharge of Rachel Brawner; that the arbitrators should issue an award ordering the Company to reinstate this employee with

back pay; and that the Union will then bring action in the United States District Court to enforce the award, and will join as defendants the Secretary of the Navy and his subordinates, "to secure against them an order requiring them to desist from interfering with the Company's compliance with the award". The Union cites an earlier arbitration case in which such a result was accomplished without resort to court action.

Position of the Company

The Company contends (1) that it has not discharged this employee, and (2) that any interruption of her employment was not ordered or caused by the Company, but was the result of official government action which the Company has no control.

Award

The undersigned, being a majority of the arbitrators, decide as follows:

Article 6 of the Contract requires the Union, in a wrongful discharge grievance case, to "prove that an employee was suspended or discharged without good and sufficient cause". The evidence before us does not establish that Rachel Brawner was ever discharged by the Company. There was no evidence from which it can be said that the Company ever indicated any desire or intention to terminate or dispense with her services. On the contrary, the Company has from the time this situation first arose always said that her services were excellent and that they would put her back to work immediately if she could prevail on the government officials to restore her security badge. And it is clear that without such badge she cannot work for the Company because she cannot enter the grounds of the Gun Factory.

We think the good faith of the Company is not open to question in this situation, and that it was not required to

do more than it did in seeking a hearing for the employee. She herself said that when she asked the Company supervisor what she ought to do, he suggested that she write to the Superintendent of the Gun Factory. And the Union must have been aware of the courses which were open to secure an official explanation as to why the employee had been denied security clearance.

122 We think the Union is adopting an unrealistic approach in seeking to obtain an adjudication from this Board that the employee was wrongfully discharged and should be reinstated, and then proposing to use such adjudication as a basis for compelling Governmental action restoring her clearance status. The real grievance of the employee and of her Union has never been against the Company; it has been and is against those who have (wrongfully, she contends) denied her physical access to the place of her employment.

It is our decision and award that Rachel Brawner was not discharged without good and sufficient cause, and that the demand of the Union in her behalf is not justified.

Our dissenting colleague advises us that he will file a dissenting opinion following the date hereof.

/s/ Nathan Cayton
Nathan Cayton

/s/ John B. Cullen
John B. Cullen

Dissenting:

/s/ Samuel H. Jaffee (8/6/57)
Samuel H. Jaffee
(with opinion to be later filed)

Washington, D. C.
July 17, 1957.

123 AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR
VOLUNTARY LABOR ARBITRATION TRIBUNAL

Case No. L-18508; WASH L-1-57

An Arbitration Between

CAFETERIA AND RESTAURANT WORKERS, LOCAL 473

and

M & M RESTAURANTS, INC.

DISSENT BY SAMUEL H. JAFFEE

I dissent. Not only, in my view, has the majority decided wrongly but it has not squarely met the issue at all. The case came to arbitration on the Union's claim that the Company violated Section 6 of the 1954-1956 collective bargaining agreement which provides in part that "The Employer agrees not to suspend or discharge any employee without good and sufficient cause." Because the employer, under another (later) contract to which the Union was not a party, and of which the Union did not have knowledge, in effect contracted to permit a breach of Section 6, the majority absolves the Company from liability here. The majority has decided *not* the issue presented to the Board of Arbitration for determination, but something else. In doing so it has, I respectfully suggest, failed in its obligation to decide the issue properly before it.

Because the majority's outline of the facts is inadequate to enable the reader to know what actually happened, and what the problem before us is, I set them out now.

I

There is not factual dispute of consequence in the evidence. As Mr. Cullen, Company counsel (he was also the Company's designee as arbitrator on the Board), said in oral argument, "There is no question about the facts of the matter" (Transcript 96), and in his brief he said

(page 1) that "There is no dispute as to the facts in the case". My colleagues have agreed with me that the stenographic transcript of the testimony accurately presents those facts brought out at the hearing, and that the transcript may be considered incorporated by reference as part of the majority decision. What, then, happened here?

The Company, a private corporation, operates cafeterias within the grounds of the Naval Gun Factory in Washington, D. C. Since 1942, and eves since, the Union was duly certified by the National Labor Relations
124 Board for the usual collective bargaining purposes (see Labor-Management Relations Act, Section 9(a)). The collective bargaining agreements between the parties have so recognized the Union for these purposes.

The employees are civilian, non-governmental employees. It is conceded that *none has access to "classified information"*. Indeed, Baker, the manager of the cafeterias, has no such access.

The cafeterias are operated pursuant to an agreement between the Company and the "Board of Governors", a body composed of seven civilian governmental employees appointed by the Superintendent of the Naval Gun Factory. The Union was not only *not* a party to this agreement, but until the arbitration hearing it did not know of its existence or contents. The agreement, herein called the Concession Agreement, was executed October 1, 1955 (the collective bargaining agreement here involved was executed March 3, 1954 and was in existence through December 31, 1956). Section 5(b) of the Concession Agreement provides in part as follows:

> * * * In no event shall the Concessionaire [the Company] engage, or continue to engage, for operations under this Agreement, personnel who
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> (i) fail to pass satisfactory medical examinations where the handling of food is involved;

(ii) are not courteous, conscientious and competent to perform the duties to which they are assigned;

(iii) fail to meet the security requirements or other requirements under applicable regulations of the Activity [Naval Gun Factory], as determined by the Security Officer of the Activity.

At all times material herein Mrs. Rachel Brawner worked as a short-order or breakfast cook in one of the cafeterias. She had been there employed for about 6½ years. The Company states that it is "completely satisfied with the employment record of Rachel Brawner and considers her above average in the discharge of her duties".

On November 14, 1956, a member of the Board of Governors telephoned Baker, the cafeteria manager, requesting that the Company have Brawner "turn in her . . . identification badge . . . ;" that there was "a question of security clearance".

On November 15, Brawner was relieved from work. Baker told her he had been instructed to pick up her badge "for security reasons". Brawner said she knew of nothing she had done that involved security. Baker said "That is all I know, to pick up your badge." Brawner
125 handed Baker the badge. Baker told her she might write to the Security Officer or to the Superintendent, or to see Mr. Palmer, her Union business agent.

Baker turned over Brawner's badge to the Security Officer. Neither then nor at any time thereafter was any explanation given for the conclusion that Brawner's security was in question. When she was first employed, Brawner, like all cafeteria employees, had been screened by the Security Officer, and no question of security concerning her had been raised in the ensuing 6½ years.

In a confirmatory memorandum from the Board of Governors to the Company on November 16, it was stated that the Security Officer had notified the Board that Brawner

"would have to surrender her . . . badge and would not be permitted to enter" the Gun Factory premises (the "yard" which included the cafeterias) "until clearance was certified by the Security Officer", and that the badge was accordingly returned on November 15.

Mrs. Brawner was immediately removed by the Company from its payroll, and her pay promptly stopped. The Union promptly asserted that this action violated Section 6 of the collective bargaining agreement, as quoted above.

The Union several times sought from the Company a statement of the reasons underlying the conclusion that Brawner did not meet "security requirements." Each time the Company replied that it did not know and was unable to find out. The Union asked "that some meeting be held" and that a "fair hearing" be accorded Brawner. Accordingly, on December 12, 1956, the Company wrote to the Board of Governors requesting that "a meeting be arranged". On January 10, 1957, the Company wrote to the Union that it had been informed by the Superintendent of the Naval Gun Factory that "such meeting would serve no useful purpose . . ."[1]

On January 30, 1957, the Union's attorney wrote to the Superintendent for information as to the procedure and authority for the action taken. On February 27, 1957, the Superintendent replied that the Concession Agreement specified that the employees of the Company "who work at the Naval Gun Factory must meet the basic security requirements [paragraph 5 (b) iii of the Concession Agreement] as regards entrance into the Naval Gun Factory. It was determined that Mrs. Rachel Brawner did not meet the basic requirements and thus her pass was revoked."

[1] This response was based on a memorandum from the Board of Governors to the Company, which in turn enclosed a memorandum from the Superintendent to the Board. The latter memorandum said that Brawner did not meet "the security requirements" set out in paragraph 5 (b) iii of the Concession Agreement.

126 On April 17, the Union's attorney wrote to the Superintendent to apprise him of the arbitration hearing to be held May 2, and inviting the Superintendent "personally or by a representative to attend the hearing to state your position and present evidence" relating to the situation. The invitation was ignored.

The only evidence at the arbitration hearing as to whether Mrs. Brawner was a security risk was to the effect that she was not.

II

The question to be decided is simply whether there was "good and sufficient cause" for the removal by the Company of Rachel Brawner from its payroll—not just any cause, but "good and sufficient" cause. What the parties have entrusted to the Arbitration Board arises from an agreement which they have made *with each other*, an agreement of a kind which is encouraged by a public policy written by the Congress into Section 1 of the National Labor Relations Act. It is the joint agreement of these parties which recognizes or creates the rights, the duties, the obligations here involved—*to each other*. That agreement, with the rights and duties created thereunder, is at once the source and the limits of the power of this Board. The collective agreement is the *charter*, not only for the parties who are here, but for the Arbitration Board which the parties have brought into being. And since that charter is at once the source and the limits of the power of the Board, the Board has no roving commission to inflict on the parties its own private notions of what it may think ought to be done. But it has, I am afraid, done precisely that here.

Brawner was and is concededly a better than average worker. What then warranted her removal from the payroll? The Company replies that the Security Officer asked for her badge "for security reasons" under a concession

agreement never made known to the Union, purporting to give him unlimited discretion so to act on his own say-so; that the Company thus had to sever Brawner from its payroll; and that the Company had no choice because it was, so to speak, "in the middle."

127. So then the Company's justification comes to this. It says in effect to us:

> We got rid of Brawner because the Security Officer asked us to,[2] as he had a right to do under the Concession Agreement we made, even though that was never made known to the Union, and even though (as shown below) the very making of it, as to the terms here relevant, was adversely to affect the employment relationship, and was, moreover, in flat violation of the law of the land and of the collective agreement itself.

Let us assume that it was a private landlord with whom this Company made the Concession Agreement, giving to that landlord the same unlimited discretion as was given to the Security Officer here, and the landlord then ordered that Brawner be kept out of the premises, as she then was. Should not the Arbitration Board, in that circumstance, properly find that the discharge was without good and sufficient cause? For why should the *collective* agreement, which requires such cause, be held nugatory simply because this employer chose to make an agreement with someone else which would bring about that result? That would make the employer its own judge, jury, and executioner. And it would then, obviously, be an idle gesture to set up an Arbitration Board in a case of this kind. (The present

[2] The attempt to draw a line between picking up the badge and the severance from the payroll is patently invalid, for the Company treated one as inevitably requiring the other. And it was a discharge, the majority to the contrary. Brawner is concededly off the payroll. But even if the severance be treated as a suspension rather than a discharge, it makes no difference here, for the collective agreement (Section 6) requires *either* to be for good and sufficient cause. Moreover, Section 5(b) of the Concession Agreement requires that the employer not "engage, or continue to engage" employees who do not meet the requirements therein set out, which of course means that the employer will not hire or *keep* such employees.

Board was set up pursuant to a provision in the collective bargaining agreement providing for arbitration.)

What is the difference here? The essential factual difference lies only in the fact that the Concession Agreement was made with a "Board of Governors" appointed by the Superintendent of the Naval Gun Factory. Does that fact require a different result? I am firmly convinced that the answer is and must be in the negative.

It was overwhelmingly shown that, Section 5(b) of the Concession Agreement aside for the moment, that when the Security Officer asked for the return of the badge "on security grounds" he acted without any legal basis
128 whatever.[3] It is important to note that he (and the Superintendent) relied for the validity of that action solely on Section 5(b) of the Concession Agreement. The Company entered into that agreement with 5(b) in it, unknown to the Union, whereby the Company, for all practical purposes, purported to abdicate its right initially to determine whether an employee warranted discharge or suspension and, instead, turned that question over to the Security Officer, a stranger to the collective agreement, who could, under the Concession Agreement, act within his uncontrolled discretion.

Of course, the Union could have no valid objection to *a* concession agreement, as such. What it does object to, and validly so, and what the law itself objects to, is this

[3] The security program applicable to private employers and employees is confined to those who have access to classified information. That is provided by the "Industrial Personnel Security Review Regulation". Section I (1) of this Regulation states: "This regulation prescribes the uniform standard and criteria for determining the eligibility of contractors, contractor employees, and certain other individuals as set forth herein, *who have access to classified defense information*" (emphasis added). See also Secs. I(2) (c), I(6) (a) (1-3). The record shows, and common sense confirms, that Rachel Brawner has no access to classified information; indeed, the Company's manager of all its cafeterias at the Naval Gun Factory has none. Further corroboration is found in the Department of Defense regulation reported in 21 Fed. Reg. 5352, 5355, s. 7.104-12 (July 18, 1956). Finally, despite inquiry as to this very matter, the Superintendent of the Naval Gun Factory has not relied for his authority to act, or that of his Security Officer, upon any statute, executive order, or departmental regulation.

particular Concession Agreement because of 5(b) in it, for that section, as far as this Company is concerned, is in violation of both the law of the land and of the collective agreement itself.

Section 9(a) of the National Labor Relations Act provides that a majority union "shall be the exclusive representative of all the employees" in the bargaining unit "for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . ." As the Supreme Court said in *NLRB* v. *Jones & Laughlin*, 301 US 1, 44 (the landmark case), the obligation being exclusive "*it exacts the negative duty to treat with no other*" (emphasis added). And "collective bargaining extends to matters involving discharge actions . . .", *Inland Steel* v. *NLRB*, 170 F.2d 247, 252 (CA-7), cert. den. 336 US 960.

It is obvious, therefore, that by contracting with another to permit the Security Officer to get an employee off the payroll, who allegedly fails to meet the standards of 5(b) of the Concession Agreement, the Company violated its statutory duty "to treat with no other" on matters as to which the Union is the exclusive bargaining representative. A contract which is the product of an employer's violation of his statutory duty, cannot "limit or condition the terms of a collective agreement." So held the Supreme Court in *J. I. Case Co.* v. *NLRB*, 321 U.S. 332, 337. Accord-
129 ingly, the Concession Agreement, *as here applicable*, falls because of its incompatibility with the National Labor Relations Act. There is simply no other conclusion that is possible.[4]

And who was it that violated the law and the collective agreement? The answer is M & M Restaurants, Inc. So, then, the case comes to this: The Company breaks the law

[4] It is idle to speculate what the situation would be had there been no Section 5(b) in the Concession Agreement. For the fact is that provision is in it and both the Company and the Superintendent of the Naval Gun Factory rely solely upon that section as justification for what happened.

and the management-union agreement and now tells us as follows:

> Even though we broke the law and the collective agreement, resulting in the severance of Brawner without good and sufficient cause, you cannot successfully arbitrate the severance. Even though we broke the law and the collective agreement you, the employee, and you, the Union, cannot proceed against us for the violation.

To which the majority adds: "And the Union must have been aware of the courses which were open to secure an official explanation as to why the employee had been denied security clearance." This, I must confess, I cannot understand at all. *What* "courses . . . were open" to secure that "explanation"? Did not the Union ask for an "explanation" both from the Company and the Superintendent of the Naval Gun Factory? Was not any explanation denied? And was not the request for a meeting met with the response that it would "serve no useful purpose"?

When the majority speaks of "courses" that are "open", does it mean that the Union should have sued the Government officials involved? But if that be so, why should it be the *Union* which should have to go to court? Among other things, this would mean that for some strange reason Section 5(b) of the Concession Agreement, which has no warrant in law at all, is to override a collective agreement in the face of the Labor Act policy which encourages the making of such agreements.

It is elementary to anyone with substantial familiarity with labor relations that there is no greater threat to such relations, indeed no greater threat to the very existence of a labor organization, than to permit an employer the unilateral action it has indulged here. If an employer, directly or indirectly, can on his own, get the membership fired without the redress and the procedure prescribed in the collective agreement itself (via the arbitration provi-

sion), where the discharge is without good and sufficient cause, then the union's very life is in serious jeopardy, for its bargaining strength is gone.

130 But the Company takes the position that it has been caught in a squeeze. First of all, it is sufficient to reply that assumed business exigency is neither a defense to a violation of law nor to a breach of contract.[5] Second, the "squeeze", such as it is, is of the Company's own making. Having participated in its own violation of both the law and the collective agreement, it hardly lies in the mouth of the employer to use its own illegality, and its own breach, as the very means of absolving itself from its own wrong. In the circumstances shown here, the law simply leaves the Company where it has chosen to place itself, and it is for *it* to extricate itself from the dilemma of its own fashioning, instead of attempting to pass the squeeze on to the employee who is, concededly, completely innocent in every way.

Moreover, the squeeze is more apparent than real, or is at best but temporary. There was no practical problem in a similar situation at the Pentagon, as shown in the decision of the arbitration board in the case of *National Food Corporation*, 24 Labor Arbitration Reports 567. If, however, following an award in favor of the Union, the Superintendent of the Naval Gun Factory should remain adamant, the Union could take the case to the District Court and join the appropriate government officials as parties. If the Union should lose in court, then, from that point on, the Company would be in the clear. For then,

[5] The following is from *NLRB v. Hudson Motor Car Co.*, 128 F. 2d 528 (CCA-6), at 532-33: "Respondent's contention boils down to the proposition that it was forced [to do what it did] and that under the circumstances here present, it was not a free agent . . . and therefore should not be charged with a violation of the Act because it had no intent to violate any of its terms . . . We think it right and just to say that so far as the record shows, respondent has not wilfully violated the provisions of the Act, but the intent of the employer is not within the ambit of our power of review. When it is once made to appear from the primary facts that the employer has violated the express provisions of the Act, we may not inquire into his motives."

on the basis *of valid authority*—the Court order—the Company could, for the first time, claim impossibility of performance, a traditional defense in the law of contracts. But that is not, or at least is not yet, the situation here. For there is yet no "impossibility of performance" in the legal sense.[6]

There is an old legal principle to the effect that where one of two innocent persons must suffer, the one who must bear the loss is the one who has created the situation which has resulted in the wrong. We all agree that Brawner must, on this record, be found to be an innocent person. I do not believe that the Company is entitled to that appellation, for it broke the law of the land and the
131 collective agreement, and in doing so it created the very situation which brought about Brawner's severance from the M & M payroll. But even assuming the Company were innocent, is this not a perfect case for the application of the legal principle referred to? Why then should *Brawner* be the one to suffer? Why should it not be up to M & M Restaurants, Inc. to extricate itself from its own wrong?[7]

I have said that the Security Officer acted as he did without any legal authority. If it be suggested that any want of authority is overcome by the Security Officer's control of access to government property, it is, in my view, sufficient to answer that control of access does not empower a federal officer to act in excess of his authority or under authority not validly conferred. For otherwise no government employee could ever have successfully challenged his

[6] See Restatement, Contracts, s. 454 ff, and Corbin, Contracts, s. 1320 ff.

[7] That the principle above referred to exists in labor law, is shown by the following from *NLRB* v. *Industrial Cotton Mills*, 208 F. 2d 87 (CA-4) at page 91: "It is true that where denial of reinstatement results from the employer's reasonable and sincere mistake, there is no evil intention behind the harm suffered by the employee. While the employer's attitude may not be censurable, the employee too is free of blame. As between the victim of the mistake and the person who made the mistake, it seems just that the perpetrator bear the onus of his own error rather than that the burden of this error should be shifted to the employee who cannot guard against it."

ouster from public employment on security grounds: the government could simply answer his protest by saying that the government cannot be required to permit him to work in a building it owns and from which his entry could be barred. Yet the number of cases is substantial where the courts have overturned such ousters and have thus, perforce, reinstated the right of access.

And a non-government employee stands in no worse position. For whatever the rights of the Security Officer may be in the abstract, where, as here, he and the Superintendent of the Naval Gun Factory have relied for their right of ouster solely on Section 5(b) of the Concession Agreement, and it has been abundantly shown that that "right" cannot override the collective bargaining agreement and the law of the land, it is invalid to argue that the Union's case must fail on any theory of the right to bar access. Within our scheme of limited powers, federal officers are not lords of the manor empowered to act without authority or under invalid authority.

A final point: It may be asked how else the Company could have protected itself in cases of this kind. One way it could have done so was to seek the inclusion into the collective agreement of a clause like one between the present Union and Government Services, Inc., a private
132 company which provides cafeteria service in several government buildings in the Washington area. That clause provides in part that grievances concerning suspensions or discharges shall not be subject to arbitration where the "Suspension or discharge [is] made at the request of the Head of a Federal Agency." But there is no such clause in the agreement here.[8] And in any event,

[8] My colleague, Mr. Cullen, who also acted as Company counsel in this case, informed the other members of the Board, as I originally understood him, that during the negotiations which led to the making of the collective agreement here in issue, the Company sought the inclusion into the agreement of a clause like the one between this Union and Government Services, Inc. as quoted above, but that no such clause became part of the collective agreement in the present case. Because it was understood that this fact would be in-

as has been seen, the Company may not validly use its own illegality, and its own violation of the collective agreement, as the very means of its own absolution. My colleagues have, unfortunately, accepted such bootstrap reasoning, and have simultaneously penalized the innocent party while rewarding the wrongdoer.

SAMUEL H. JAFFEE
Arbitrator

Washington, D. C.
August 6, 1957

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133 (Filed Oct. 7, 1957)

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action File No. 2246-57

CAFETERIA AND RESTAURANT WORKERS UNION, LOCAL 473, AFL-CIO, RACHEL M. BRAWNER, *Plaintiffs*

v.

M & M RESTAURANTS, INC., ET AL., Naval Gun Factory, Washington, D. C., *Defendants*

Answer to Complaint for Declaratory Judgment, for Injunctive Relief, to Vacate an Arbitration Award, and to Recover Damages

Defendant M & M Restaurants, Inc. answers the complaint in the above entitled cause as follows:

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cluded in the majority decision, Union counsel did not move to reopen the record so that such fact could be included therein. Mr. Cullen later informed me that he was misunderstood, that in fact it was in connection with the collective agreement between the present parties which was to take effect *following* the expiration of the current agreement (the expiration date being December 31, 1956) that the parties discussed the insertion of such a clause, but did not insert it. I accept Mr. Cullen's version on this point. But in either event, the fact serves to emphasize what is stated in the text above.

FIRST DEFENSE

The complaint fails to state a cause of action upon which relief can be granted.

SECOND DEFENSE

1. Defendant admits allegations in paragraph 1 of the complaint.

2. Defendant is without knowledge as to the allegations in paragraph 2 of the complaint and therefore neither admits nor denies them but demands strict proof of the same.

3. Defendant admits the allegations contained in paragraph 3, 4, 5, 6, 7 and 8 of the complaint.

4. Defendant admits the allegations contained in paragraph 9 of the complaint but avers that the agreement between the defendant and the Board of Governors of the Naval Gun Factory Cafeterias entered into on October 1, 1955 is a successor agreement to one entered into originally in 1946.

5. Defendant admits the allegations in paragraph 10 of the complaint except with allegation that the plaintiff, Rachel M. Brawner was discharged which it denies.

6. Defendant admits the allegations contained in paragraphs 11 and 12 of the complaint.

134 7. Defendant admits the allegations in paragraph 13 of the complaint that the plaintiff Brawner has not worked for the company since November 15, 1956 and has received no wages or other benefits from the company since that time, but denies that it discharged the plaintiff Brawner and that her employment with the company was permanently severed.

8. Defendant admits the allegations contained in paragraph 14 of the complaint.

9. Defendant is without knowledge as to the allegations contained in paragraphs 15 and 16 of the complaint and neither admits nor denies same but demands strict proof thereof.

10. Defendant admits the allegations contained in paragraph 17 of the complaint.

11. Defendant admits the allegations contained in paragraph 18 of the complaint except it denies that the plaintiff Brawner was discharged.

12. Defendant admits the allegations contained in paragraph 19, 20, 21 and 22 of the complaint.

13. Defendant admits the allegations contained in paragraph 23 of the complaint but avers that the reference to exhibit 15 of the plaintiff is argumentative and has no place in the complaint.

14. Defendant is without knowledge of the allegations contained in paragraph 24 of the complaint and neither admits nor denies the same, but demands strict proof thereof.

15. Defendant admits the allegations contained in paragraph 25 of the complaint that the award of a majority of the Board of Arbitrations and the majority and dissenting opinions were sent to the representatives of the Company and the Union. It also admits as to the holding of the majority of the Board of Arbitrations but denies that the majority based this conclusion on the views as alleged in paragraph 25 of the complaint. The award, plaintiff's Exhibit S speaks for itself and the defendant denies that the majority of the Board expressed its reasons for the conclusion contained therein.

135 16. Defendant is without knowledge as to the allegations contained in paragraph 26 of the complaint and neither admits nor denies the same but demands strict proof thereof.

17. Defendant denies the allegations contained in paragraph 27 of the complaint.

18. Defendant denies the allegations that the majority of the Board of Arbitration exceeded its powers as alleged in paragraph 28 of the complaint and is without knowledge as to the other allegations contained therein and neither admits nor denies the same, but demands strict proof thereof.

WHEREFORE, defendant M & M Restaurants, Inc., prays that the complaint herein be dismissed with the costs to the plaintiff.

JOHN B. CULLEN
John B. Cullen
Investment Building
Washington 5, D. C.
Attorney for Defendant
M & M Restaurants, Inc.

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136 (Filed November 4, 1957)

Answer

Now come the defendants Neil H. McElroy, Thomas S. Gates, D. M. Tyree and H. W. Williams, and in answer to the Complaint filed herein, say:

FIRST DEFENSE

The Complaint fails to state a claim upon which relief may be granted.

SECOND DEFENSE

The Court lacks jurisdiction over the subject matter of the Complaint.

THIRD DEFENSE

Answering specifically the allegations contained in the numbered paragraphs of the Complaint, the defendants McElroy, Gates, Tyree, and Williams aver:

1. Defendants assert that inasmuch as the allegations contained in paragraph 1 of the Complaint state conclusions of law, they are not required to plead responsively thereto; but were they required to reply, they would deny the conclusions of law alleged therein.

137 2-3. The defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 2 and 3 of the Complaint.

4. The Defendants admit the allegations contained in paragraph 4 of the Complaint.

5. Answering paragraph 5 of the Complaint, the defendants admit that M. & M. Restaurants, herein called the Company, transacts business within the District of Columbia, and has an office at the United States Naval Gun Factory. The defendants also admit that the Company operates five cafeterias on the premises of the Naval Gun Factory. The defendants are without knowledge or information sufficient to form a belief as to the truth of the other allegations contained therein.

6. The defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 6 of the Complaint.

7. The defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 7 of the Complaint except that defendants admit that up to September 1946, the cafeterias at the United States Naval Gun Factory were operated by a Miss H. K. Dickson, and that in September 1946, the Company took over operation of the cafeterias from Miss Dickson.

8. The defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 8 of the Complaint.

9. Answering paragraph 9 of the Complaint, the defendants admit that there are five cafeterias operated by the Company on the premises of the Naval Gun Factory, and that the Company's employees are civilian nongovernmental personnel. The defendants admit the other allegations contained therein.

10. The defendants are without knowledge or information sufficient to form a belief as to the truth of the
138 allegations contained in paragraph 10 of the Complaint except that the defendants admit that one of the cafeterias operated by the Company on the premises of the United States Naval Gun Factory is known as the Bellevue Annex Cafeteria and is located at Overlook Drive and Chesapeake Street, S. W., Washington, D. C.

11. The defendants deny the allegations contained in paragraph 11 of the Complaint except that the defendants admit that on November 14, 1956, H. R. Pyles, Secretary-Treasurer of the Board of Governors, telephoned H. R. Baker, and requested that Baker return Plaintiff Brawner's identification badge to Defendant Williams. The defendants further admit that an identification badge is required to secure entrance to and exit from the Naval Gun Factory.

12-13. The defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 12 and 13 of the Complaint.

14. The defendants admit the allegations contained in paragraph 14 of the Complaint.

15. Answering paragraph 15 of the Complaint, the defendants admit that Rachel M. Brawner, and Harold R. Baker have no authorized access to classified information.

16. The defendants deny the allegations contained in paragraph 16 of the Complaint.

17. The defendants admit the allegations contained in paragraph 17 of the Complaint.

18. The defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 18 of the Complaint.

19. The defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 19 except that defendants admit that the Board of Governors received a letter from the Company dated December 12, 1956, a true and correct copy of which is annexed to the Complaint as Exhibit G-1, which letter speaks for itself.

139 20. The defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 20 of the Complaint.

21. The defendants admit the allegations contained in paragraph 21 of the Complaint.

22. The defendants admit the allegations contained in paragraph 22 of the Complaint.

23-25. The defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 23 to 25 inclusive, of the Complaint.

26. The defendants deny the allegations contained in paragraph 26 of the Complaint.

27-28. The defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 27 and 28 of the Complaint.

WHEREFORE, the defendants pray that the Complaint be dismissed with costs to the defendants.

JAMES T. DEVINE
Attorney,
Department of Justice
Washington, D. C.

DONALD S. SMITH
Attorney,
Department of Justice
Washington, D. C.

Attorneys for Defendants

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141 Filed November 13, 1957

Interrogatories

To: Neil H. McElroy, Thomas S. Gates,
D. M. Tyree, and H. C. Williams, Defendants
c/o James T. Devine, Esq. and
Donald S. Smith, Esq.
Internal Security Division
Department of Justice
Washington 25, D. C.

The following interrogatories are addressed to you pursuant to Rule 33 of the Federal Rules of Civil Procedure. You are required to answer these Interrogatories separately and fully, in writing, under oath, and to serve a copy of your answer Bernard Dunau, 912 Dupont Circle Building, N. W., Washington 6, D. C., attorney for plaintiffs, within 15 days after mailing of these Interrogatories as indicated below:

1. Referring to your partial denial of the allegations of paragraph 11 of the complaint, state in detail the contents of the conversation or conversations had on November 14, 1956, and/or on any other day, between H. R. Pyles, Secretary-Treasurer of the Board of Governors, and Harold R. Baker, supervisor of the Company's cafeterias at the Naval Gun Factory, pertaining to plaintiff Rachel M. Brawner.

2. Referring to your answer to the allegations of paragraph 15 of the complaint, (a) state whether Rachel M. Brawner has *any* access to classified information, (b) if she has *any* access, state in detail what that access is, (c) state whether Harold R. Baker has *any* access to classified information, and (d) if he has *any* access, state in detail that that access is.

142 3. Refering to your denial of the allegations of paragraph 16 of the complaint:

(a) Prior to the initial employment of a civilian non-governmental employee to work within the premises of the Naval Gun Factory, is a procedure followed by the officials of the Naval Gun Factory to determine whether such an employee should be given an identification badge?

(b) If the answer to (a) is yes, state in detail what that procedure is?

(c) If the answer to (a) is yes, state (i) whether that procedure was in effect at the time of Rachel M. Brawner's initial employment by the Company to work within a cafeteria at the Naval Gun Factory, and (ii) if it was not in effect, state in detail what, if any, procedure was then in effect.

(d) If a procedure was in effect at the time of her initial employment, state whether it was applied to Rachel M. Brawner.

(e) Was any question of security pertaining to Rachel M. Brawner communicated to her or to officials of the

Company before November 14, 1956, by any official of the Naval Gun Factory?

(f) If the answer to (e) is yes, state in detail when this was and what happened.

4. Are the memoranda reproduced at pages 37-38 of Exhibit P of the complaint, identified therein as Company's exhibits 2 and 2-A, true copies of genuine documents?

5. Referring to the denial of the allegations of paragraph 26 of the complaint, state in detail the authority by which you support the action taken by you.

Submitted by:

BERNARD DUNAU
Bernard Dunau
912 Dupont Circle Bldg., N. W.
Washington 6, D. C.
Attorney for Plaintiffs.

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145 Filed Dec. 23, 1957

Answers to Interrogatories

Answer of defendants D. M. Tyree and H. W. Williams to Interrogatories served on them by plaintiffs on November 12, 1957.

Interrogatory No. 1. On November 14, 1956, H. R. Pyles contacted Harold R. Baker, by telephone, and informed him that it would be necessary to have Rachel Brawner surrender her identification badge to Lieutenant Commander Williams. Mr. Baker inquired as to the reason and was informed that it was for security reasons and that the badge was to be returned as soon as possible. Baker advised that Brawner left the premises at 3:00 P.M. and

would not be available until the following morning but that he would return the badge to Lieutenant Commander Williams the next morning. Mr. Pyles then informed Mr. Baker that this would be confirmed in writing. On November 15, 1956, Mr. Baker came to Mr. Pyles' office and stated that he had returned Brawner's badge to the Security Officer and that she had requested specific reasons for this action. Baker further advised that he had informed her that the only information he had was for security reasons and that she could see Lieutenant Commander Williams and request further information if she desired. Baker stated that Brawner said she would not do this but would see Mr. Palmer of the Cafeteria and Restaurant Workers Union. Baker also stated that he would apprise Mr. McKaye of the situation.

Interrogatory No. 2. Neither Brawner nor Baker have authorize access to classified information, however, the defendants are unable to state whether or not Brawner or Baker have had access to any of the restricted areas on the premises of the Naval Gun Factory or whether Brawner or Baker have access to any classified information.

146 *Interrogatory No. 3.* (a) Yes.

(b) Each applicant for an identification badge is required to complete an application form, a true and correct copy of which is annexed hereto. In addition, each applicant is finger-printed.

(c) None of the defendants held their present positions at the time of Brawner's initial employment and are unable to state what procedure was in effect at that time, however they have reason to believe that the same procedure presently in use was in effect then.

(d) As stated above, none of the defendants held their present positions at the time of Brawner's initial employment and are unable to state whether or not the proceed-

ure was applied to Brawner, however they have reason to believe that it was applied to Brawner.

(e) No.

Interrogatory No. 4. The memoranda reproduced at pages 37-38 of Exhibit P of the complaint, identified therein as Company's exhibits 2 and 2-A are true and correct copies of genuine documents.

Interrogatory No. 5. This interrogatory calls for a conclusion of law which defendants are not required to answer, however, the defendants refer the plaintiffs to the following.

The United States Constitution.

The United States Code and United States Statutes at large.

United States Navy Regulations, 1948, as amended.

United States Navy Security Manual For Classified Matter.

/s/ D. M. TYREE
D. M. Tyree

/s/ HAROLD W. WILLIAMS
Harold W. Williams

Subscribed and sworn to before me this 20th day of December, 1957.

/s/ PORFIRIO F. EUGENIO
Notary Public D. C.

My Commission expires 3/14/58.

148 APPLICATION TO SECURITY OFFICER FOR PASS

NAME .....

ADDRESS .....

EMPLOYED BY .....

DATE OF EMPLOYMENT .....

PLACE OF BIRTH .....

DATE OF BIRTH .....

WIFE'S MAIDEN NAME .....

PARENT'S BIRTH PLACE .....

FORMER EMPLOYERS AND APPROXIMATE DATES,
REASON FOR CHANGING: .....

.....

.....

.....

NAMES AND ADDRESSES OF PARENTS,
BROTHERS AND SISTERS .....

.....

.....

.....

HAVE YOU ANY RELATIVES LIVING IN FOREIGN COUNTRIES ..

.....

MILITARY OR NAVAL SERVICE .....

RACE (White or Colored) .....

WHERE WERE YOU AND WHAT DOING BETWEEN THE PERIOD 1914 TO 1918 .....

.....

WHAT IS YOUR SOCIAL SECURITY NUMBER? .....

149 HAVE YOU EVER BEEN FINED OR IMPRISONED? SPECIFY .....

.....

.....

REFERENCE (personal) .....

.....

.....

I agree to obey all Naval Gun Factory Regulations, proceed by route designated going and returning, and th my person or vehicle is subject to search by military poli or yard police. I further agree to safeguard badges issu to the best of my ability, and will return same prompt upon expiration, and report loss or mutilation immediate

I, ... SOLEMNLY SWEAR (or affirm) th

the statements contained are true to the best of my ability or knowledge.

Signature of applicant

Date

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150 Filed Feb. 8, 1958

Plaintiffs' Motion for Summary Judgment

Plaintiffs move for summary judgment against all defendants upon the ground that no genuine issue of material fact exists and plaintiffs are entitled to judgement as a matter of law, as more particularly appears in the points and authorities in support of the motion attached hereto.

/s/ BERNARD DUNAU
Bernard Dunau
JAFFEE & DUNAU
912 Dupont Circle Building
Washington 6, D. C.
Attorney for Plaintiffs.

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151 Filed Feb. 27, 1958

Motion to Dismiss Complaint or Cross-Motion for Summary Judgment

Now come the defendants McElroy, Gates, Tyree and Williams and move the court under Rule 12(b) (1) and (6), Rules of Civil Procedure, to dismiss the action because the court does not have jurisdiction over the subject matter and because the complaint fails to state a claim against defendants upon which relief can be granted, or in the alternative to grant summary judgment for defendants

under Rule 56, Rules of Civil Procedure, on the ground that there is no genuine issue as to any material fact and that defendants are entitled to judgment as a matter of law.

JAMES T. DEVINE
James T. Devine
Attorney,
Department of Justice
Washington, D. C.

DONALD S. SMITH
Donald S. Smith
Attorney,
Department of Justice
Washington, D. C.
Attorneys for Defendants

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154 Filed Mar. 11, 1958

Motion Supplementing Defendants' Motion to Dismiss or Cross-Motion for Summary Judgment

Now come the defendants McElroy, Gates, Tyree and Williams and move the Court to dismiss the action or in the alternative to grant summary judgment and as further grounds, supplementing the grounds already set forth in defendants motion to dismiss or cross-motion for summary judgment which said motion is incorporated herein and made a part hereof; defendants state that so much of the plaintiffs' suit pertaining to the restoration of plaintiff Brawner to her former position with the defendant Restaurant on the premises of the U. S. Naval Gun Factory, the furnishing of an identification badge to Brawner au-

thorizing her to enter the premises of the Naval Gun Factory and payment of money damages for loss of pay subsequent to January 31, 1958, are moot for the reason that the defendant Restaurant has not operated any concession enterprise on the premises of the Naval Gun Fac-
155 tory since January 31, 1958, as appears more particularly in the attached affidavit of Charles E. Briner, Superintendent of the United States Naval Gun Factory.

Attached hereto and made a part hereof by reference as Defendants' Exhibits A, B, C, D, E, F, and G, are:

A. Affidavit of Charles E. Briner, Superintendent of the U. S. Naval Gun Factory.

B. Certified copy of a deed of conveyance from James C. and Mary A Dulin, dated October 27, 1873, to the United States of America.

C. Certified copy of General Order No. 227, relating to the Reorganization of the U. S. Navy Yard, Washington, D. C.

D. Certified copy of pages 81, 82, 84, 87, and 209 of United States Navy Regulations, issued August 9, 1948, the text of said pages being in full force and effect throughout November 1956.

E. Certified copy of pages 87 and 209 of United States Navy Regulations, 1948, as changed by Change No. 7, promulgated June 4, 1957, by the Secretary of the Navy and in effect at all times since June 4, 1957.

F. Certified copy of pages 14-1 through 14-4 of the United States Navy Security Manual for Classified Matter, which was promulgated on October 2, 1954, which pages have been in full force and effect at all times since.

G. Certified copy of Department of Defense Directive 5200.8 dated August 20, 1954.

JAMES T. DEVINE
James T. Devine
Attorney,
Department of Justice
Washington, D. C.

/s/ DONALD S. SMITH
Donald S. Smith
Special Assistant to the
United States Attorney
Washington, D. C.

Attorneys for the Defendants

157 (EXHIBIT A)

Affidavit of Charles E. Briner

CITY OF WASHINGTON }
DISTRICT OF COLUMBIA } ss

I, Charles E. Briner, having first been duly sworn, on oath depose and say as follows:

1. I am a Captain in the United States Navy. I am the Superintendent of the United States Naval Gun Factory. As Superintendent I am the commanding officer of the United States Naval Gun Factory, charged with overall responsibility for said United States Naval Gun Factory.

2. On January 31, 1958, the concession contract between the Board of Governors, Naval Gun Factory Cafeterias, and M & M Restaurants, Inc., pursuant to which M & M Restaurants, Inc., operated cafeterias on the premises of the Naval Gun Factory, expired. Said contract was not renewed. On January 31, 1958, M & M Restaurants, Inc., ceased to operate the cafeterias on the premises of the Naval Gun Factory; and at no time since January 31, 1958, has M & M Restaurants, Inc., operated any cafeterias, or any other concession enterprise, on the premises of the Naval Gun Factory.

3. At all times since February 1, 1958, the Naval Gun Factory cafeterias have been operated by Inplant
158 Foods, Inc., a corporation organized and existing under the laws of the District of Columbia.

Further deponent sayeth not.

CHARLES E. BRINER
Charles E. Briner
Captain, United States Navy
Superintendent, United States
Naval Gun Factory
Washington 25, D. C.
Affiant

On this 27th day of February, 1958, before me personally appeared Charles E. Briner, to me known to be the person described in, and the person who executed the foregoing affidavit, and acknowledged it to be his free and voluntary act.

PORFIRIO F. EUGENIO
Notary Public, Wash. D. C.
My Commission expires 3/14/58.

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165 (EXHIBIT C)

General Order No. 227

Navy Department,
Washington, D. C.,
28 November 1945.

REORGANIZATION OF THE U. S. NAVY YARD, WASHINGTON, D. C., AND THE ESTABLISHMENT OF THE U. S. NAVAL GUN FACTORY, WASHINGTON, D. C.

1. The U. S. Navy Yard, Washington, D. C., is, in accordance with the provisions of this order, hereby abolished.

2. The activites present by comprising the Navy Yard, Washington, D. C., shall be regrouped or redistributed as follows:

(a) All departments, divisions, and activities which contribute directly or indirectly to the work of the Naval Gun Factory (including the Design, Planning, Production, Inspection, Gage, and Personnel Relations Divisions; the Supply, Accounting, Disbursing, Medical and Public Works Departments; the activities of the Captain of the Yard; and the Naval Magazine at Bellevue) shall be integrated into one overall organization to be known as the "U. S. Naval Gun Factory, Washington, D. C.," and shall be under the immediate command of an officer designated

"Superintendent, U. S. Naval Gun Factory". This organization shall form one component activity of the Potomac River Naval Command (hereinafter referred to as PRNC).

(b) Each of the remaining activities which do not form a part of the U. S. Naval Gun Factory as defined above (including the Receiving Station, the Marine Barracks, the Naval Ordnance Laboratory, and the Photographic Intelligence Center shall be under the immediate direction of a commanding officer or officer-in-charge, as appropriate, and each such organization shall form a separate component activity of the PRNC.

3. Each of the above component activities, the Ordnance Stock Office, and the activities specified in General Order 192, shall be under the *military command* and *coordination control* of the Commandant of the PRNC, who will, in turn, be directly responsible to the Chief of Naval Operations. The specific duties and authority of the Commandant, PRNC, in relation to all component activities shall be as follows:

(a) We shall exercise *military command* of these activities, which authority is defined as the authoritative direction exercised over component activities in military matters (defense, security, intelligence, communications, fire protection, military discipline, etc.,) together with the power to exercise authoritative direction in all matters when circumstances require.

(b) We shall exercise *coordination control* of these activities which authority is defined as that direction of component activities necessary to assure well integrated relationships among component organizations, together with the authority to make such inspections as are necessary to insure coordination.

166 (c) He shall coordinate the provision of services to the Operating Forces by component activities.

In this connection, he shall be in command of all vessels at, but not assigned to, component activites of the PRNC, but shall limit the exercise of this command:

(1) To coordinating the relationships between the commanding officers of such vessels and the commanding officers of component activities; and

(2) To the enforcement of regulations pertaining to the military administration of the PRNC as provided in paragraph 3(a) above. Upon arrival and before departure of any vessel, the commanding officer shall report to the Commandant, PRNC.

4. Each of the component activities of the PRNC, including the U. S. Naval Gun Factory, shall be under a commanding officer or officer-in-charge as appropriate. Each such commanding officer or officer-in-charge shall be under the military command and coordination control of the Commandant of the PRNC. For all matters of management and technical control, each such commanding officer or officer-in-charge shall be under the direct supervision of the cognizant agencies of the Navy Department designated by the Secretary of the Navy.

5. The officer ordered to command of the U. S. Naval Gun Factory shall be designated Superintendent, U. S. Naval Gun Factory, shall be technically trained in the manufacture of ordnance equipment, and shall have had substantial previous experience in the technical and management phases of such work, both in naval ordnance activities and in the Navy Department. The Superintendent shall be assisted by an "Assistant Superintendent" who shall possess the same general qualifications as those prescribed for the Superintendent.

6. It is the duty of the superintendent, U. S. Naval Gun Factory, to supervise and direct all of the work of the Gun Factory; to assume full responsibility for the quality and quantity of work produced; and to assure the

efficent and economical performance of all of the work of the Gun Factory. The Superintendent, U. S. Naval Gun Factory, shall report to the Chief of the Bureau of Ordnance for management control.

7. All commissioned naval vessels at the U.S. Naval Gun Factory or other component activities of the PRNC shall be subject to the orders of the commanding officer of the component activity for (1) matters pertaining to the specific services rendered to such vessels by the component activity, including ship movements; and (2) the enforcement of the component activity regulations relating to police, fire, security, safety, communications, sanitation, and other matters of plant maintenance and protection. The commanding officers of ships are, however, fully responsible for the internal administration and handling of their vessels while at the component activity except as otherwise provided for in Navy Regulations. The commanding officer's responsibilities regarding the inspection of
167 work done on their vessels are as defined in the Navy Regulations. In the event of any unsatisfactory conditions regarding repairs or other services performed by component activities which cannot be promptly resolved between the commanding officer of the ship concerned and the commanding officer of the component activity, the matter shall be referred to the Commandant, PRNC, in his capacity and responsibility for coordinating services within the PRNC.

8. The internal organization of the U.S. Naval Gun Factory shall include the following main departments: Design, Planning, Production, Inspection, Public Works, Supply, Fiscal (including accounting and disbursing), Medical and Administration (including matters of military personnel administration, security, fire protection, communications, plant protection, and various other administrative services required by the departments of the Gun Factory). In addition, there shall be attached to the staff of the Super-

intendent an Industrial Relations Division (to handle matters of the civilian personnel administration) and a Management Planning and Review Division. The detailed organization and functions of the departments and divisions of the Gun Factory shall be determined jointly by the Superintendent, Naval Gun Factory, and the cognizant agencies of the Navy Department.

9. All directives, regulations, and instructions which conflict with the foregoing are hereby modified.

10. The Chief of Naval Operations shall place the provisions of this general order in effect not later than 1 December 1945.

JAMES FORRESTAL
Secretary of the Navy

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169 (EXHIBIT D)

0701. Responsibility of the Commanding Officer.

1. The responsibility of the commanding officer for his command is absolute, except when, and to the extent, relieved therefrom by competent authority, or as provided otherwise in these regulations. The authority of the commanding officer is commensurate with his responsibility, subject to the limitations prescribed by law and these regulations. While he may, at his discretion, and when not contrary to law or regulations, delegate authority to his subordinates for the execution of details, such delegation of authority shall in no way relieve the commanding officer of his continued responsibility for the safety, well-being, and efficiency of his entire command.

* * *

170 0704. Effectiveness for Service.

The commanding officer shall:

1. Exert every effort to maintain his command in a state of maximum effectiveness for war service consistent with the degree of readiness prescribed by proper authority.

* * *

171 0713. Security of Classified Matter.

The commanding officer shall require that orders and regulations pertaining to the security of registered publications, and of classified documents, material, and information are strictly observed.

* * *

172 0733. Rules for Visits.

1. The commanding officer shall not permit foreigners or representatives of foreign activities to make inspections on board naval vessels or aircraft or at naval activities, or to inspect work being done or material assembled or stored for the Naval Establishment at private manufacturing establishments, shipyards, or other places without specific permission of the Chief of Naval Operations. When such permission has been given, he shall detail an officer to accompany the visitor, and following the inspection shall advise the Chief of Naval Operations by letter as to the details of what was shown and what was refused.

2. Unless specific permission has been granted by the Chief of Naval Operations, the commanding officer shall not permit visitors to make other than casual inspections on board naval vessels or aircraft or at naval activities, or in those portions of private establishments where work is being done or material assembled or stored for the Naval Establishment.

3. Commanding officers and others officially concerned shall exercise reasonable care to safeguard the persons and property of visitors to naval activities.

0734. Dealers, Tradesmen, and Agents.

In general, dealers or tradesman or their agents shall not be admitted within a command, except as authorized by the commanding officer:

1. To conduct public business.

2. To transact specific private business with individuals at the request of the latter.

3. To furnish services and supplies which are necessary and are not otherwise, or are insufficiently, available to the personnel of the command.

• • •

173 1502. Control of Classified Matter.

1. The Chief of Naval Operations shall supplement these regulations with appropriate publications including the Security Manual, Registered Publications Manual, Communication Instructions, and such other detailed instructions as are necessary to insure proper control of classified matter, including cryptographic systems and procedures. All such publications and instructions shall have the full force and effect of these regulations.

• • •

175 (EXHIBIT E)

0733. Rules for Visits.

1. Commanding officers are responsible for the control of visitors to activities of the Department of the Navy and shall comply with the relevant provisions of the U. S. Navy Security Manual for Classified Matter and other pertinent directives.

2. Commanding officers shall take such measures and impose any restrictions on visitors as necessary to safeguard the classified matter under their jurisdiction. Ar-

rangements for general visiting shall always be based on the assumption that foreign agents will be among the visitors.

3. Commanding officers and others officially concerned shall exercise reasonable care to safeguard the persons and property of visitors to naval activities.

0734. Dealers, Tradesmen, and Agents.

In general, dealers or tradesmen or their agents shall not be admitted within a command, except as authorized by the commanding officer:

1. To conduct public business.

2. To transact specific private business with individuals at the request of the latter.

3. To furnish services and supplies which are necessary and are not otherwise, or are insufficiently available to the personnel of the command.

• • •

176 1502. Control of Classified Matter.

The Chief of Naval Operations shall supplement these regulations with detailed instructions to insure the proper control of classified matter. Such instructions shall include the United States Navy Security Manual for Classified Matter, Registered Publication Manual, Communication Instructions, Armed Forces Industrial Security Regulation and such others as may from time to time be issued. All such publications shall have the full force and effect of these Regulations.

178 (EXHIBIT F)

Chapter 14

VISITOR CONTROL

1401. RESPONSIBILITY.

1. The Chief of Naval Operations is responsible for the formulation and promulgation of the policy governing visits to activities of the Naval Establishment.

2. Officers in a command status shall be responsible for the security control of visitors within the limits of their jurisdiction. They shall promulgate such additional directives as are necessary for the control of visitors within their respective commands.

1402. VISITORS

The term "visitors" as used herein for security purposes applies as follows:

1. A visitor on board ship or aircraft is any person who is not a member of the ship's company or not a member of a staff using the ship as a flagship.

2. A visitor to a naval shore establishment is any person who is not attached to or employed by the command or staff using that station as headquarters.

1403. CATEGORIES OF VISITORS

Persons who are considered visitors as described in article 1402 are divided into four basic categories which are further subdivided as follows:

Category One United States citizens except those representing a foreign government or a foreign private interest.

Able Department of Defense and United States Coast Guard personnel (military and civilian).

Baker Personnel of private facilities under contract to the Department of Defense.

Charlie Employees of other United States Government activities who are participating in Navy programs.

Category Two United States citizens not described in Category One.

Able Representatives of a foreign military service.

Baker Representatives of a foreign government or private interest.

Charlie Other United States citizens.

Category Three Foreign nationals (including foreigners in the United States on nonimmigration visas).

Able Representatives of a foreign military service.

Baker Representatives of a foreign government or private interest.

Charlie Foreign nationals in the United States sponsored by a military department, or other foreign nationals employed on military projects, either as contractor's employees or departmental employees.

Dog Other foreign nationals.

Category Four Immigrant aliens (foreigners in the United States on immigration visas).

1404. VISIT CLEARANCES

1. Visits to activities of the Naval Establishment by persons who will not have access to classified matter need no authorization from the Chief of Naval Operations. The commanding officer concerned is responsible for the decisions and conditions under which such visits are permitted. Although the visit is unclassified, all visitors in categories Two Able, Two Baker, and Three shall be accompanied by a competent escort (refer to article 1411), except when

general visiting is in progress (refe to articles 1412 and 1413).

179 2. Visits to activities of the Naval Establishment by persons who will have access to classified matter shall be processed in accordance with the requirements of table C and article 1405 below.

A visitor will be considered to have "access" to classified matter when he is permitted to gain knowledge of such matter through observation or discussion. This term is also interpreted to mean that a visitor will have access when classified matter is exposed in such a manner in the space being visited, or en r ute to the space to be visited, that he will gain knowledge through observation alone.

3. The column headings are explained as follows:

a. Column 1, Gategory of Visitor—The "category of visitor" is as described in article 1403.

b. Column 2, Application Made By—This column sets forth the person designated to initiate the request for the visit clearance. Applications shall be made by letter or, if time does not allow, by message. They shall be submitted sufficiently in advance to permit necessary arrangements to be made.

c. Column 3, To—This column specifies the cognizant officer to whom the application for clearance shall be addressed and who shall approve or disapprove the visit.

d. Column 4, Via—In this column is set forth the chain of command from the originator to the final approving authority.

e. Column 5, Information Required—Certain information is required before final approval can be given. (Refer to article 1405.).

• • •

181 1409. RESPONSIBILITIES OF THE COMMAND BEING VISITED.

1. The commanding officer of the activity being visited has full discretion as to whether or not the visit shall be permitted. The granting of "approval" or "clearance" for a visit, even though emanating from higher authority than the command being visited, shall be interpreted as an indication that competent authority has no objection to the visit at the time and under the conditions specified and that the visit is subject to the convenience of the command to be visited.

2. The term "subject to local restrictions", when used in connection with the approval of visits, shall be interpreted to mean that the commanding officer of the activity being visited may impose any restrictions or limit the purpose of the visit to any degree necessary for the command to properly exercise his responsibility of safeguarding the classified matter under his jurisdiction.

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183 (EXHIBIT G)

20 August 1954
Number 5200.8

DEPARTMENT OF DEFENSE DIRECTIVE

SUBJECT Authority of Military Commanders under the Internal Security Act of 1950 to Issue Security Orders and Regulations for the Protection of Property or Places under Their Command

Reference: (a) Secretary of Defense Memorandum, dated 11 May 1951, Subject: "Authority of Military Commanders Under the Internal Security Act of 1950 to Issue Security Orders and Regulations for the Protection of Property or Places Under Their Command"

I. PURPOSE

The purpose of this Directive is:

A. To designate military commanders to promulgate regulations for the protection of property or places under their command, pursuant to the provisions of Section 21 of the Internal Security Act of 1950 (Public Law 831, 81st Congress).

B. To reissue in directive form the provisions of Reference (a) in order to comply with Section VI of Department of Defense Directive 5025.1, dated 2 February 1954, subject: "Department of Defense Directives System".

II. CANCELLATION

Reference (a) is cancelled and superseded by this Directive.

III. BACKGROUND

A. Section 21 of the Internal Security Act of 1950 states:

"797. *Security regulations and orders; penalty for violation*

(a) Whoever willfully shall violate any such regulation or order as, pursuant to lawful authority, shall be or has been promulgated or approved by the Secretary of Defense, or by any military commander designated by the Secretary of Defense, or by the Director of the National Advisory Committee for Aeronautics, for the protection or security of military or naval aircraft, airports, airport facilities, vessels, harbors, ports, piers, water-front facilities, bases, forts, posts, laboratories, stations, vehicles, equipment, explosives, or other property or places subject to the jurisdiction, administration, or in the custody of the Department of Defense, any Department or agency of which said Department consists, or any officer or employee of said Department or agency,

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or of the National Advisory Committee for Aeronautics or any officer or employee thereof, relating to fire hazards, fire protection, lighting, machinery, guard service, disrepair, disuse or other unsatisfactory conditions thereon, *or the ingress thereto or egress or removal of persons therefrom, or otherwise providing for safeguarding the same against destruction, loss, or injury* by accident or by enemy action, *sabotage or other subversive actions*, shall be guilty of a misdemeanor and upon conviction thereof shall be liable to a fine of not to exceed $5,000 or to imprisonment for not more than one year, or both.

"(b) Every such regulation or order shall be posted in conspicuous and appropriate places. Sept. 23, 1950, c. 1024, Title I, Par. 21, 64 Stat. 1005."

IV. Designation of Authority

The following military commanders are hereby designated as having the authority to promulgate the necessary regulations pursuant to paragraph III above.

A. Commanding officers of all military reservations, posts, camps, stations, or installations subject to the jurisdiction, administration, or in the custody of the Department of the Army.

B. Commanding officers of all naval ships, stations, activities and installations; and commanding officers of all Marine Corps posts, stations, and supply activities, subject to the jurisdiction, administration, or in the custody of the Department of the Navy.

C. Commanders of major air commands, numbered air forces, air divisions, wings, groups and installations, subject to the jurisdiction, administration, or in the custody of the Department of the Air Force.

V. PROMULGATION OF REGULATIONS

A. Regulations promulgated by military commanders designated hereby shall be in accordance with policies and procedures relative thereto established by the Secretary of the Military Department concerned.

185 B. Regulations issued pursuant hereto shall be posted in a conspicuous and appropriate place, and shall make appropriate citation of this designation and the Public Law under which the designation is made.

VI. EFFECTIVE DATE

This Directive is effective immediately.

C. E. WILSON
Secretary of Defense

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186 Filed March 14, 1958

Affidavit of Plaintiff Rachel M. Brawner

I, Rachel M. Brawner, plaintiff in the above matter, being duly sworn, depose and say that:

1. At no time during the full period of my employment at the Bellevue Annex Cafeteria of the Naval Gun Factory, when I came to work each morning, was I ever escorted by any one from the gate of the Bellevue Annex to Building 65 (the place within the Annex where the cafeteria is located and where I worked). I was never escorted from Building 65 to the gate when I left work each afternoon. I had no escort at any time during any part of the day that I was within the Bellevue Annex.

2. At the time I first stated working at the Annex, before the guards came to know me, upon approaching the

gate in the morning to go to work, I placed my identification badge, which was suspended on a chain, about my neck. I walked through the gate without ever being stopped and proceeded directly to my place of work. The guard could observe the badge on me. He never inspected it. After I became known to the guards, I didn't put the identification badge on, because the guards knew me and let me through just on seeing me.

The same thing happened when I left work in the afternoon. At first, I put the badge on me, but after the guards came to know me, that wasn't necessary.

At no time while I was working in the cafeteria did I wear the identification badge.

3. For the full six and one-half years before my discharge on November 15, 1956, except for vacations,
187 holidays, and very infrequent absences, I worked everyday at the Bellevue Annex Cafeteria, Monday through Friday, from 6:00 a.m. to 3:00 p.m.

/s/ RACHEL M. BRAWNER
Rachel M. Brawner

Sworn to and subscribed before
me this 11th day of March, 1958.

/s/ CECIL F. GIBSON
Notary Public, District of Columbia

My commission expires 6/14/60.

188 Filed March 14, 1958

Affidavit of Oliver T. Palmer

I, Oliver T. Palmer, being duly sworn, depose and say that:

1. I am business agent of the plaintiff Union in the above matter. I have occupied that position since February 1943.

2. The number of employees within the bargaining unit at the Naval Gun Factory cafeterias represented in collective bargaining by the Union ranges between 30 and 35 employees.

3. A few days before January 16, 1958, Harold R. Baker telephoned me to say that he and Claude S. Breeden, Jr., desired to confer with me. Until a few months before then, Harold R. Baker had been supervisor of the cafeterias operated by Defendant M & M Restaurants, Inc. at the Naval Gun Factory, and Claude S. Breeden had been secretary of M & M Restaurants, Inc.

4. A conference was held on January 16, 1958, at the Union's headquarters, attended by Breeden, Baker, myself, and Angus Bea, president of the Union. Baker stated that a new corporation had been formed called Inplant Foods Incorporated; that the two officers of Inplant Foods Incorporated were Baker, who was President and Treasurer, and Breeden, who was Vice-President and Secretary; and that as of February 1, 1958, Inplant Foods Incorporated was taking over the operation of the cafeterias at the Naval Gun Factory.

The remainder of the conference was devoted to discussing and reaching agreement upon the status of the Union, the existing collective bargaining agreement, and Plaintiff Rachel M. Brawner. Baker stated that Inplant Foods Incorporated recognized the Union as the exclusive

bargaining representative of the employees working
189 at the cafeterias of the Naval Gun Factory. Baker asked that I send to him a letter incorporating the understanding reached on that day between the Union and Inplant Foods Incorporated upon the various matters discussed; and that he would like to have the letter by January 22, and at least no later than January 23, 1958, in order to have it when he met with the Board of Governors of the Naval Gun Factory Cafeterias on January 24, 1958.

On January 21, 1958, I sent Baker a letter incorporating the agreement that had been reached. A true copy of the January 21, 1958, letter is attached hereto as Exhibit A. Under date of February 14, 1958, Baker sent me a letter expressing concurrence in my letter of January 21, 1958. A true copy of the February 14, 1958, letter is attached hereto as Exhibit B. On February 19, 1958, I sent Baker a further letter, a true copy of which is attached hereto as Exhibit C, in reply to his letter of February 14, 1958.

Among the items agreed upon was that which pertained to Plaintiff Rachel M. Brawner. As expressed in item 4 of the January 21, 1958 letter (Exhibit A), it was agreed between the Union and Inplant Foods Incorporated that:

> The new company will reinstate Mrs. Rachel Brawner with retroactive seniority rights, and further accumulation thereafter, if, as a result of the pending suit in the United States District Court by the Union against certain government officials and M & M Restaurants, Inc. it is held in effect that M & M Restaurants, Inc. or said government officials acted without legal authority. The new company shall, however, not be liable for back pay, except for back pay accruing after any breach by it of its refusal to reinstate Mrs. Brawner as required by this paragraph.

5. On February 24, 1958, and March 4, 1958, meetings were held between the Union and Inplant Foods Incorporated to negotiate a collective bargaining agreement to succeed the existing collective bargaining agreement due

to expire March 15, 1958. It was agreed between parties to extend the existing collective bargaining agreement as is to June 15, 1958, and to begin negotiations for a succeeding agreement not later than the first week of June 1958.

190 /s/ OLIVER T. PALMER
Oliver T. Palmer

Sworn to and subscribed before me
this 12 day of March, 1958.

/s/ JOSEPH H. MILLER
Notary Public, District of Columbia

My commission expires 11/30/59.

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191 (EXHIBIT A)

January 21, 1958

Mr. H. R. Baker, President & Treasurer
Inplant Food Incorporated
513 Belvedere Boulevard
Silver Spring, Maryland

Dear Mr. Baker:

This letter confirms points agreed to in conference held on January 16 with you and Mr. Breeden:

1. The new company is to assume all obligations of the current collective bargaining agreement between the Union and M & M Restaurants, Inc. This includes full recognition of accumulated seniority rights and the continuance thereof, of all employees covered by the agreement.

2. The new company recognizes and accepts for all purposes the notice sent by the Union to M & M Restaurants, Inc. dated January 13, 1958 (copy enclosed), as binding upon Inplant Food Incorporated.

3. The Union will recognize and accept certain rules outlined in the Concessionaire Agreement so far as the same are not in violation of the law.

4. The new company will reinstate Mrs. Rachel Brawner with retroactive seniority rights, and further accumulation thereafter, if, as a result of the pending suit in the United States District Court by the Union against certain government officials and M & M Restaurants, Inc. it is held in effect that M & M Restaurants, Inc. or said government officials acted without legal authority. The new company shall, however, not be liable for back pay, except for back pay accruing after any breach by it of its refusal to reinstate Mrs. Brawner as required by this paragraph.

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5. It is further understood that this agreement is without prejudice to the rights of the Union or of Mrs. Brawner in connection with the said suit against certain government officials and M & M Restaurants, Inc., and it is not to be construed as any waiver of rights thereunder.

Very truly yours,

OLIVER T. PALMER
Business Agent

Effective date of the above February 1, 1958

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(EXHIBIT B)

INPLANT FOODS, INC.
WASHINGTON, D. C.

February 14, 1958

Mr. O. T. Palmer, Business Agent
Cafeteria and Restaurant Workers Union
1438 You Street, N. W.
Washington 9, D. C.

Dear Mr. Palmer:

This will acknowledge receipt and concurrence with your letter of January 21, 1958, wherein we agreed to certain conditions relative to the agreement between the Cafeteria workers and management within the U. S. Naval Gun Factory. However, we wish to detail Item 3 as follows:

1. The Concessionaire shall engage all the personnel necessary to maintain efficient service at a high standard of cleanliness and sanitation, and shall be responsible for all compensation due to such personnel pursuant to the operation under this agreement. In no event shall the Concessionaire engage, or continue to engage, for operations under this agreement, personnel who

   (a) fail to pass satisfactory medical examinations where the handling of food is involved

   (b) are not courteous, onscientious and competent to perform the duties to which they are assigned

   (c) fail to meet the security requirements or other requirements under applicable regulations of the

Activity, as determined by the Security Officer of the Activity.

Very truly yours,

INPLANT FOODS, INC.

/s/ HAROLD R. BAKER
Harold R. Baker
President

HRB/dw

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194 (EXHIBIT C)

February 19, 1958

Mr. Harold R. Baker, President
Inplant Foods, Inc.
Naval Gun Factory Cafeterias
8th and M Streets, S. E.
Washington 25, D. C.

Re: Communication dated
February 14, 1958

Dear Mr. Baker:

Reference is made to your letter of acknowledgement and concurrence with our letter of January 21, 1958 in which you detail your expressed wish concerning Item 3 of our agreement reached in our conference held on January 16, 1958.

Please be advised that our Union will accept the inclusion in the new collective bargaining agreement of the following provision from the Concessionaire Agreement to the extent that the same does not conflict with the law:

1. The Concessionaire shall engage all the personnel necessary to maintain efficient service at a high standard of cleanliness and sanitation, and shall be responsible for all compensation due to such personnel pur-

suant to the operation under this agreement. In no event shall the Concessionaire engage, or continue to engage, for operations under this agreement, personnel who

(a) fail to pass satisfactory medical examinations where the handling of food is invalued involved.

(b) are not courteous, conscientious and competent to perform the duties to which they are assigned

(c) fail to meet the security requirements or other requirements under applicable regulations of the
195 Activity, as determined by the Security Officer of the Activity.

Very truly yours,

OLIVER T. PALMER
Business Agent

(Filed April 14, 1958)

Affidavit of Denver E. McKaye.

Denver E. McKaye, President of M & M Restaurants, Inc., a Maryland corporation, being duly sworn doth depose and make oath to the following facts:

That he is President of M & M Restaurants, Inc., and has been President of said corporation since prior to November 1, 1956; that there was in the employ of said corporation on November 1, 1956 at the Naval Gun Factory, Washington, D. C., one Rachel M. Brawner, who had been employed by said corporation for some period of time, and whose work was generally satisfactory; that on or about November 14, 1956, M & M Restaurants, Inc., was notified by the Board of Governors of the Naval Gun Factory that the Security Officer thereof had demanded that Rachel M.

Brawner surrender her identification badge for admittance to the premises and that, therefore, she could not be admitted to the cafeteria on the premises of the Gun Factory for employment.

That Rachel M. Brawner was at that time a member of the Cafeteria and Restaurant Workers Union, Local 473, affiliated with the AFL-CIO, and that said union made demand, on her behalf, for an explanation of the above action; that M & M Restaurants, Inc., could not place her on the rolls of employees for that cafeteria as she was unable to enter the premises, because of the official action of the Board of Governors and the Security Officer of the Naval Gun Factory.

That as result thereof, an exchange of correspondence took place between M & M Restaurants, Inc., and Oliver T. Palmer, Business Agent for the Cafeteria and Restaurant Workers Union, Local 473, and pursuant thereto a personal conference occurred among your deponent, Oliver T. Palmer, a Mr. Bea, President of said local and, to the best of the recollection and belief of your deponent, Harold Baker, Cafeteria Supervisor for M & M Restaurants, Inc.; that at said meeting, the position of M & M Restaurants, Inc., was explained and reiterated by your deponent and your deponent suggested that in order to assure his cooperation in the matter, he would employ Rachel M. Brawner at another location where M & M Restaurants, Inc., operated a food service establishment, namely, the Skylark Motel, Springfield, Virginia; that Oliver T. Palmer, on a date subsequent to said meeting notified your deponent that Rachel M. Brawner was not interested in accepting the proffered employment at The Skylark Motel because of the location of the said The Skylark Motel and that said alternate employment was therefore refused by Oliver T. Palmer on behalf of Rachel M. Brawner. That to the best of the recollection and belief of the deponent, said meeting

and subsequent reply took place between December 1 and December 16, 1956.

DENVER E. McKAYE,
President M & M Restaurants, Inc.

Subscribed and sworn to this 13th day of March, 1958.

Notary Public

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196 (Filed July 30, 1958)

Order Granting Defendants' Cross-Motion for Summary Judgment

This cause having been heard on plaintiffs' motion for summary judgment and defendants' motion to dismiss or cross-motion for summary judgment, and the Court having considered all of the record, the pleadings, affidavits, exhibits, and memoranda of points and authorities filed herein and there having been a full and complete hearing and the Court having found that there is no genuine issue as to any material fact and that the defendants are entitled to judgment as a matter of law, it is now, therefore, by the Court this 21 day of July, 1958

ORDERED, that the plaintiffs' motion for summary judgment be, and the same hereby is, denied; and it is

FURTHER ORDERED, that the defendants' cross-motion for summary judgment be, and the same hereby is, granted, and that the complaint be, and the same hereby is, dismissed as to all defendants with costs to the defendants.

/s/ EDWARD M. CURRAN
United States District Judge

199 (Filed August 14, 1958)

Notice of Appeal

Notice is hereby given that Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO, and Rachel M. Brawner, plaintiffs herein, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the order entered on the docket in this action on July 30, 1958.

BERNARD DUNAU
Bernard Dunau
912 Dupont Circle Building, N. W.
Washington 6, D. C.
Attorney for plaintiffs-appellants

Dated at Washington, D. C., this 13th day of August, 1958.

[fol. 134] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14689

CAFETERIA AND RESTAURANT WORKERS UNION, LOCAL 473, AFL-CIO, et al., Appellants

v.

NEIL H. McELROY, Individually, and as Secretary of Defense, et al., Appellees

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Appeal from the United States District Court for the District of Columbia

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OPINION—Decided August 21, 1959

Withdrawn by order of the Court—April 18, 1960

Mr. Bernard Dunau for appellants.

Mr. DeWitt White, Attorney, Department of Justice, of the bar of the Supreme Court of West Virginia, *pro hac vice*, by special leave of court, with whom *Messrs. Leo J. Michaloski, Jerome L. Avedon,* and *Justin R. Rockwell,* Attorneys, Department of Justice, were on the brief, for appellees.

Before EDGERTON, FAHY, and DANAHER, *Circuit Judges.*

EDGERTON, *Circuit Judge*: A private corporation, M & M Restaurants, Inc., under a contract with government officers, operated a cafeteria in the Naval Gun Factory, property of the United States. The corporation employed [fol. 135] appellant Brawner, a civilian, as a cook. Without a hearing of any sort, the Superintendent and the Security Officer of the Naval Gun Factory excluded her from the premises and thereby deprived her of her job. They said

she did not meet the "security requirements". No one told either her or the corporation which employed her what the security requirements were, or why she was believed not to meet them. The employer asked for "a hearing relative to the denial of admittance to the Naval Gun Factory of Rachel Brawner." The request was refused.

Brawner and her labor union sued the Secretary of Defense, the Secretary of the Navy, the Superintendent and the Security Officer of the Gun Factory, and also Brawner's employer, for the loss of her job, and have appealed from a summary judgment dismissing the complaint.

Except with respect to the employer, the District Court erred. This has now become clear. On June 29, 1959, the Supreme Court determined that the Secretary of Defense and his subordinates have not been empowered to deny a contractor's employee access to his work, and thereby deprive him of his job, on security grounds, "in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination." *Greene* v. *McElroy*, 360 U.S. 474, —— (Slip op. pp. 33-34). What government officers are not empowered to do in such a proceeding, which includes a limited sort of hearing, they are not empowered to do in a proceeding that includes no hearing at all. As in the *Greene* case, if the action of the government officers was in accordance with Navy regulations, the regulations were unauthorized and invalid.

It is immaterial that Greene's working place does not appear to have been, as Brawner's was, on government property. From the premise that "the United States could validly exclude all persons from access to the Naval Gun Factory", appellees draw the conclusion that the Secretary [fol. 136] of Defense could validly exclude Brawner from her work there, on "security" grounds, without giving her a hearing. If the conclusion followed from the premise, it would likewise follow that the Secretary could deprive government employees of their jobs on similar grounds, without giving them a hearing, by simply excluding them from the places where they work. But neither Congress nor the President has authorized any such thing. And it is clear that government officials may not deprive government employees of their jobs on security grounds except as

authorized by Congress or the President. *Peters* v. *Hobby*, 349 U.S. 331; *Cole* v. *Young*, 351 U.S. 536.

The government challenges the standing of appellant labor union to sue. We think the union here had standing to protect the interests of its members.[1] *Cf. Nat'l Ass'n for the Advancement of Colored People* v. *Alabama*, 357 U.S. 449, 459-460; *MacArthur Liquors, Inc.* v. *Palisades Citizens Ass'n*, —— U.S.App.D.C. ——, 265 F. 2d 372.

Since Brawner's employer could not employ her within the Naval Gun Factory, the only place where it had contracted to employ her, when the government appellees would not let her enter the place, it is not responsible for ceasing to employ her. Appellants' claim against the employer is for alleged breach of contract, and impossibility of per- [fol. 137] formance defeats the claim. The judgment in favor of M & M Restaurants, Inc., is therefore affirmed. The judgment in favor of the government appellees is reversed and the case is remanded to the District Court for proceedings consistent herewith.

So ordered.

FAHY, *Circuit Judge, concurring*: I have concurred in Judge Edgerton's opinion, but in view of the dissenting portion of Judge Danaher's opinion I add these words of my own.

As has been pointed out, appellant Brawner was a privately employed cook in the cafeteria, conducted with Government agreement by M & M Restaurants, Inc., on the premises of the Naval Gun Factory. None of the papers before us indicates that she had access to classified information or to any restricted part of the Naval Gun Factory which posed a security problem over and above that affect-

[1] The union was the recognized representative of the employees of M & M Restaurants, Inc., under a collective bargaining agreement between the union and the Restaurants. The agreement authorized the union to participate in any dispute arising thereunder, including a dispute over discharge of any employee. When Implant Foods, Inc., replaced the Restaurants as the operator of the cafeteria, the new collective bargaining contract included a provision whereby Implant agreed to reinstate appellant with full rights should this suit be determined in her favor. *Cf. Fishgold* v. *Sullivan Corp.*, 328 U.S. 275, 283.

ing her as a cook in the cafeteria. Under settled law, recently expounded by the Supreme Court in *Greene* v. *McElroy*, 360 U.S. 474, the right to hold specific private employment comes within the "property" protected by the Due Process Clause of the Fifth Amendment against unreasonable governmental interference. The question before us, therefore, is not whether the Government can control access to the Naval Gun Factory, which of course it can do, but whether the control it exercised in this instance, which caused the loss of the cook's employment in the cafeteria, conformed with the requirements of the Due Process Clause. The location of the employment is a relevant circumstance on the issue of due process of law, but does not dispense with the issue. Since we are a government of law, and I can find no authority in any law, Executive Order or [fol. 138] regulation which authorized the deprivation of this cook's employment in the manner in which it occurred, for that reason alone I think the deprivation was invalid, as in *Greene*.

Appellant Brawner was not a visitor or a tradesman or tradesman's agent within the meaning of the regulations controlling the access of these persons to the premises. She was not an employee of the Navy, and so was accorded none of the benefits of the clearance regulations applicable to such an employee in security matters. She was simply deprived of her employment out of hand, without notice, hearing, opportunity to be heard, or statement of reason except that she did not meet "security requirements." Even were this authorized by some law or competent authority I do not see how it could be squared with due process of law. Due process of law requires a reasonable procedure; and to be reasonable a procedure must be such as reason is able to appraise in all the circumstances as fair; and in order for reason to do that I think the procedure must at least in the circumstances before us disclose to the person affected enough of the basis for the action to enable her to test its truth, with an opportunity in some manner to do so.

We do not decide that confrontation and right of cross-examination were essential, the question reserved by the Supreme Court in *Greene*, for here as there that question

is not reached because in any event the manner of deprivation of employment was unauthorized and in this case was otherwise unreasonable as well. Since it was unauthorized and unreasonable due process of law was lacking in both respects.

We are not concerned with truck drivers and others mentioned by my brother Danaher; none of these complains of having been deprived of his employment by governmental action. If any were to do so, we might have a question like the one we do have. Finally, I do not understand [fol. 139] the relevance of the reference in the dissenting opinion to the authority of the Superintendent to bar a petty thief or a numbers player or a narcotic peddler, or other unfit person. But when any deprivation of liberty or property does involve such as these the courts do not withhold from them the application of the Due Process Clause. The Fifth Amendment provides that "No person shall be . . . deprived of life, liberty or property without due process of law."

DANAHER, *Circuit Judge*: I concur specifically in the majority's opinion affirming the judgment in favor of M & M Restaurants, Inc. Otherwise I dissent.

To say that some officials may have abused their authority is not to deny that authority exists. This is not such a situation as was presented in *Greene* v. *McElroy*, 360 U.S. 474. The property here is owned by the Government and is part of the naval establishment. Control of access to the Naval Gun Factory has legally been vested in the Superintendent. When the public may enter and for what purposes and under what circumstances may be determined by that officer, in accordance with governing regulations. Congress has even made it a criminal offense, under some circumstances, for unauthorized personnel to be upon the premises. 18 U.S.C. § 1382 (1952).

The basic principle of control by the Government of its own naval establishment is here paramount, I think. Truck drivers, plumbers, telephone operators, electricians, artisans in every walk of life, in one way or other and at one time or other may have legitimate business with

a naval base, but the privilege of access is to be extended and may be continued only as those charged with maintaining the security of the Government's operation may by regulation prescribe. If some petty thief or numbers [fol. 140] player or narcotics peddler or otherwise unfit person should insist upon continuance of a previously extended privilege of access, I think the regulations authorize the Superintendent to bar him.

I am unable to conclude that regulations under which the officials here acted were invalid or unauthorized. Particularly do I dissociate myself from the suggestion that invalidity implicitly turns upon whether, in application, provision has been made for "confrontation and cross-examination" of sources whose reports may have led to revocation of the privilege of access to the Government's enclave.

[fol. 141] Petition for Rehearing En Banc (omitted in printing).

[fol. 156] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Title omitted]

ORDER GRANTING PETITION FOR REHEARING EN BANC—
October 26, 1959

Upon consideration of appellees' petition for a rehearing en banc, it is

Ordered by the court that the petition for rehearing en banc is granted and that this case shall be scheduled for hearing before the court on November 9, 1959.

Per Curiam.

Dated: October 26 1959

Circuit Judges, Edgerton, Bazelon and Fahy would deny the petition.

[fol. 157] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Title omitted]

MOTION TO SUPPLEMENT RECORD—Filed February 3, 1960

Appellants move the Court to supplement the record in the following respects:

1. The action in this case was commenced against Defendant Thomas S. Gates individually and as Secretary of the Navy. Defendant Thomas S. Gates was confirmed as Deputy Secretary of Defense on May 18, 1959, and appointed as Secretary of Defense on December 2, 1959. The action against Defendant Thomas S. Gates continues therefore individually and as Secretary of Defense.

2. The action was commenced against Neil H. McElroy individually and as Secretary of Defense. On December 1, 1959 Defendant McElroy resigned as Secretary of Defense. The action therefore continues against Defendant Neil H. McElroy individually in order to recover against him damages for the harm inflicted by his performance of an unauthorized act.

Wherefore this motion to supplement the record to show the foregoing matters should be granted.

Bernard Dunau, 912 Dupont Circle Building, N.W., Washington 6, D.C., Attorney for Appellants.

Certificate of Service (omitted in printing).

[fol. 158] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Title omitted]

ANSWER TO APPELLANTS' MOTION TO SUPPLEMENT RECORD—
Filed February 5, 1960

The appellees answer the "Motion to Supplement Record" as follows:

1. Appellees do not object to an order amending the title of this action to describe appellee Gates as now Secretary of Defense.

2. Appellees suggest that as against appellee McElroy in his capacity of Secretary of Defense the action has abated and an order to that effect should be entered.

3. Insofar as it may be an allegation of fact appellees deny the statement in said motion that: "The action therefore continues against Defendant Neil H. McElroy individually in order to recover against him damages for the harm inflicted by his performance of an unauthorized act." The appellees have always taken the position that neither appellee McElroy, nor any of the governmental appellees is liable individually to the appellants, or either of them, and that question is one of the issues now under consideration [fol. 159] by the Court on this appeal. (See our brief, pp. 36-37.) In view of Mr. McElroy's resignation from the office of Secretary of Defense, it is respectfully submitted that the action as to him should abate, and not be continued against him in his individual capacity as suggested by appellants.

J. Walter Yeagley, Assistant Attorney General; George B. Searls, De Witt White, Attorneys, Department of Justice, Attorneys for Appellees.

February 5, 1960

Certificate of Service (omitted in printing).

[fol. 160] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Title omitted]

REPLY TO ANSWER TO APPELLANTS' MOTION TO SUPPLEMENT RECORD—Filed February 9, 1960

Appellants oppose appellees' position that, as to defendant Neil H. McElroy, "the action as to him should abate, and not be continued against him in his individual capacity as suggested by appellants."

Appellees apparently confuse two matters: (1) the right to continue the action against defendant McElroy to recover money damages from him, with (2) the separate question whether, as a matter of substantive law, defendant McElroy is answerable in money damages. The present motion is concerned solely with defendant McElroy's continued status as a party to this action. Whether the record establishes a claim against defendant McElroy upon which relief can be granted in the way of money damages is not a question involved in the present motion. The latter matter is covered in appellees' brief at pages 36 to 37 and in appellants' brief at page 54, note 24. It should be observed that *Barr* v. *Matteo*, 360 U.S. 564 and *Howard* v. *Lyons*, 360 U.S. 593 are consistent with appellants' position, for appellants maintain that appellees inflicted damage by their performance of an unauthorized act, unlike the latter cases in which the Supreme Court found that the act was authorized and that recovery cannot be had for the performance of an authorized act whether or not the motive for engaging in it was proper or improper.

Respectfully submitted,

Bernard Dunau, 912 Dupont Circle Building, N.W., Washington 6, D.C., Attorney for Appellants.

[fol. 161] Certificate of Service (omitted in printing).

[fol. 162] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Title omitted]

ORDER DENYING MOTION TO SUPPLEMENT RECORD WITHOUT PREJUDICE—April 25, 1960

Upon consideration of appellants' motion to supplement the record, wherein it is requested that this action continue against Neil H. McElroy individually, of appellees' answer and of appellants' reply, it is

Ordered by the court that the motion to supplement the record is denied, without prejudice to filing by appellants of a motion to substitute party appellees as provided for by Rule 25(d) of the Federal Rules of Civil Procedure and without prejudice to filing by appellees of a motion to dismiss this appeal as to appellee Neil H. McElroy in his individual capacity.

Per Curiam.

Dated: April 25, 1960

[fol. 163] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14689

CAFETERIA AND RESTAURANT WORKERS UNION, LOCAL 473, AFL-CIO, et al., Appellants

v.

NEIL H. McELROY, Individually and as Secretary of Defense, et al., Appellees

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Appeal from the United States District Court for the District of Columbia

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OPINION ON REHEARING EN BANC—April 14, 1960

Decided April 14, 1960

Mr. Bernard Dunau for appellants.

Assistant Attorney General Yeagley, of the bar of the Supreme Court of Indiana, *pro hac vice,* by special leave of court, with whom *Messrs. Leo J. Michaloski, Jerome L. Avedon,* and *Justin R. Rockwell,* Attorneys, Department of Justice, were on the brief, for appellees. *Mr. George B. Searls,* Attorney, Department of Justice, also entered an appearance for appellees.

Before PRETTYMAN, Chief Judge, and EDGERTON, WILBUR K. MILLER, BAZELON, FAHY, WASHINGTON, DANAHER, BASTIAN, and BURGER, Circuit Judges.

[fol. 164] PRETTYMAN, *Chief Judge:* Rachel M. Brawner was a short-order cook—a "breakfast cook". In November, 1956, she worked in a cafeteria. Her duties were to prepare breakfast and lunch, attend the steam table, and wash dishes. She had been so employed for six and a half years. The cafeteria is located on Government property, the prem-

ises of the Naval Gun Factory. The land had been purchased by the United States in 1873. It is located in the District of Columbia and became part of the Gun Factory in 1945. The work of the Factory includes, *inter alia*, design, planning, production and inspection of naval ordnance.

The cafeteria was operated by a private corporation, M & M Restaurants, Inc., under a written contract with the Board of Governors, U. S. Naval Gun Factory Cafeterias. The Board of Governors is composed of seven civilian governmental employees of the Factory and is appointed by the Superintendent. M & M Restaurants, Inc., operates numerous cafeterias and restaurants in several states, including Delaware, Maryland and Virginia. It operates the three main cafeterias at the Gun Factory. In order to enter or leave the premises of the Gun Factory, an identification badge is required. The issuance of this badge is by the Security Officer of the Gun Factory, a subordinate of the Superintendent, both of whom are naval officers. The Gun Factory is a component activity of the Potomac River Naval Command. The Commandant of this Command is directly responsible to the Chief of Naval Operations.

Rachel Brawner was required to have, and did have, an identification badge. On November 15, 1956, she was notified by her supervisor that he had been told to pick up her badge "for security reasons". She surrendered her badge to him. This action of the supervisor was pursuant to a phone call from a representative of the Board of Governors to a representative of M & M Restaurants, Inc. The caller stated that the Board had been notified by the [fol. 165] Security Officer of the Naval Gun Factory, a Lieutenant Commander, that Brawner would have to surrender her badge and would not be permitted to enter the Factory "until clearance is certified by the Security Officer."

The President of M & M Restaurants, Inc., offered Brawner employment at the Skylark Motel in nearby Springfield, Virginia, where a restaurant was operated by the company. The representative of the Union, on behalf of Brawner, notified the company that she was not interested in accepting the proffer.

The Chairman of the Board of Governors made a request of the Superintendent of the Factory that a meeting be arranged for the Security Officer, the Board of Governors, representatives of M & M Restaurants, Inc., and agents of the Union to discuss the action relative to Brawner. The Superintendent replied that the agreement between the Board of Governors and M & M Restaurants, Inc., stipulated that the latter should employ only those who met the security requirements for admission to the Factory and that it was considered that Brawner "does not meet these security requirements". The Superintendent added that the proposed meeting was therefore unnecessary.

In the meantime Brawner had called upon the business agent of the local of the Union which was the bargaining representative of the cafeteria workers. This representative discussed the matter with the President of M & M Restaurants, Inc. The contract between the Union and the company provided that the employer would not suspend or discharge any employee without good and sufficient cause.[1] It further provided that in the event of a dispute the matter should be referred to a board of arbitration of three parties, one of whom might be chosen by the American Arbitration [fol. 166] Association.[2] The representative of the Union was informed by the President of the company that he could not supply any information concerning the taking of

[1] Clause 6 of the agreement between M & M Restaurants, Inc., and the Union contained the following: "The Employer agrees not to suspend or discharge any employee without good and sufficient cause."

[2] Clause 24 of the agreement provided: "The parties agree that they will endeavor to adjust any dispute that may arise from the interpretation or application of this Agreement within a period of 48 hours. In the event that no accord can be reached, the matter in dispute shall be referred to a Board of Arbitration within two days from the date which the parties to the Agreement shall fail to reach an agreement in connection with the matter in dispute, and said Board of Arbitration shall be composed of one representative of the Employer and one representative of the Union, and one disinterested party chosen by the two said members of the Board of Arbitration. In the event the two parties shall fail to agree on a third disinterested party, the parties agree that the American Arbitration Association be requested to appoint a person to serve in the capacity of the third and impartial arbitrator."

Brawner's badge. Thereupon the dispute was referred to a board of arbitrators composed of John B. Cullen, Esquire, named by the company, Samuel H. Jaffee, Esquire, named by the Union, and the Honorable Nathan Cayton, named by the American Arbitration Association. These arbitrators, Mr. Jaffee dissenting, found: "The evidence before us does not establish that Rachel Brawner was ever discharged by the Company. There was no evidence from which it can be said that the Company ever indicated any desire or intention to terminate or dispense with her services." The arbitrators further pointed out: "The real grievance of the employee and of her Union has never been against the Company; it has been and is against those who have (wrongfully, she contends) denied her physical access to the place of her employment."

In sum the facts are that Rachel Brawner, a short-order cook employed by the civilian concessionaire operator of a cafeteria located on the premises of the Naval Gun [fol. 167] Factory, was denied retention of the identification badge which had permitted her to enter the premises where she worked, the denial being by the authority of the naval officer in command of the Factory. The stated reason was that she failed to meet security requirements. She was not informed as to the factual premises for the conclusion. No charge was made against her.

After the foregoing events the Union and Mrs. Brawner filed a civil action in the District Court against the Secretary of Defense and other Government officials, in their individual and official capacities, and M & M Restaurants, Inc., for a declaratory judgment, injunctive relief, vacation of the arbitration award, and recovery of damages. The District Court granted summary judgment for the Government defendants and dismissed the complaint as to all defendants. This appeal followed.

I. The Problem Stated

The problem to be solved is a narrow one. It concerns the nature and extent of the power of a naval officer in command of a naval installation to control the ingress and egress of civilians to and from the premises. The discus-

sion on the briefs and in argument has gone far afield from this problem. The case does not involve debarment from a chosen occupation. It is not a discharge case. The case does not involve any Personnel Security Program, with its concomitant regulations.

II. Power to Control Access to Naval Gun Factory

Line of Authority.

We first examine the authority of the Navy to prescribe rules for the admission of civilians to Navy installations. The authority begins with the Constitution.

> "The Congress shall have power to dispose of and make all needful * * * regulations respecting the ter- [fol. 168] ritory or other property belonging to the United States; * * *."[3]
>
> "The Congress shall have the power * * *;
>
> * * * * * * *
>
> "To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the government of the United States, * * *."[4]
>
> "The Congress shall have the power * * *;
>
> * * * * * * *
>
> "To provide and maintain a navy;
>
> "To make rules for the government and regulation of the land and naval forces; * * *."[5]

The line of authority then proceeds by statutes.

> "The Secretary of the Navy has custody and charge of all * * * property of the Department."[6]

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[3] Art. IV, § 3, cl. 2.

[4] Art. I, § 8, cl. 17.

[5] Art. I, § 8, cls. 13, 14.

[6] 10 U.S.C. § 5031(c), which was 5 U.S.C. § 413, which was R.S. 418, derived from an Act of April 30, 1798, ch. 35, § 3, 1 STAT. 554.

"The head of each department is authorized to prescribe regulations, not inconsistent with law, for * * * the custody, use, and preservation of * * * property appertaining to it." [7]

"United States Navy Regulations shall be issued by the Secretary of the Navy with the approval of the President." [8]

[fol. 169] Next in this line of authority come certain United States Navy Regulations issued pursuant to Section 1547 of the Revised Statutes.[9] They were issued by the Secretary of the Navy; the Honorable John L. Sullivan, and approved on that same day by the President, the Honorable Harry S. Truman. These Regulations contain the following provisions:

"The responsibility of the commanding officer for his command is absolute, except when, and to the extent, relieved therefrom by competent authority, or as provided otherwise in these regulations." [10]

"In general, dealers or tradesmen or their agents shall not be admitted within a command, except as authorized by the commanding officer:

* * * * * * *

"3. To furnish services and supplies which are necessary and are not otherwise, or are insufficiently, available to the personnel of the command." [11]

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[7] This section now appears as 5 U.S.C. § 22 (1958). It was R.S. 161; derived from a number of Acts, beginning with one of July 27, 1789, ch. 4, 1 STAT. 28. It was amended in respects not here material by Pub. L. No. 619, 85th Cong., 2d Sess. (Aug. 12, 1958), 72 STAT. 547.

[8] 10 U.S.C. § 6011 (1958). This was 34 U.S.C. § 591, the source of which was R.S. 1547. In addition 10 U.S.C. § 121 (1958) provides: "The President may prescribe regulations to carry out his functions, powers, and duties under this title." This "title" of the United States Code was revised, codified and enacted into law by statute, being Pub. L. No. 1028, 84th Cong., 2d Sess., ch. 1041 (Aug. 10, 1956), 70A STAT. 1.

[9] 34 U.S.C. § 591, codified Aug. 10, 1956, as 10 U.S.C. § 6011.

[10] Regs. § 0701.

[11] *Id.* § 0734.

"The commanding officer shall require that orders and regulations pertaining to the security of • • • classified • • • material • • • are strictly observed." [12]

"Definitions.

"1. *'Classified matter.'*—Information or material in any form or of any nature which in the public interest must be safeguarded in the manner and to the extent required by its importance." [13]

[fol. 170] "Subject to law and as may be prescribed by the Secretary of the Navy, it shall be the duty of the Chief of Naval Operations to:

• • • • • • • •

"12. Prepare and issue manuals and other appropriate publications containing orders, instructions, and procedures, conforming to these regulations, and pertaining to matters for which he is responsible." [14]

"The Chief of Naval Operations shall supplement these regulations with appropriate publications including the Security Manual, • • •." [15]

The United States Navy Security Manual for Classified Matter, promulgated October 2, 1954, contained the following:

"Persons who are considered visitors • • • are divided into four basic categories which are further subdivided as follows:

"Category One	*United States citizens* • • •
"Baker [meaning (B)]	Personnel of private facilities under contract to the Department of Defense." [16]

[12] *Id.* § 0713.

[13] *Id.* § 1501.

[14] *Id.* § 0204.

[15] *Id.* § 1502.

[16] Security Manual § 1403.

"The commanding officer of the activity being visited has full discretion as to whether or not the visit shall be permitted." [17]

The U. S. Navy Physical Security Manual promulgated by the Chief of Naval Operations on April 14, 1956, contained the following:

"Definitions

"1. *Naval Activity.* A naval activity shall be construed to mean a unit of the Naval Establishment, of [fol. 171] distinct identity, and established under an officer in command or in charge.

• • • • • • • •

"3. *Facility.* A facility, for purposes of this instruction, is any building, shop or utility within an activity having a specific function." [18]

"*The Commanding Officer.* The Commanding Officer is responsible for the security of all property and installations within his command. He prescribes the security measures to be adopted, and coordinates when necessary, the measures adopted by subordinates, but he alone remains responsible for the overall security of his command." [19]

"*The Security Officer.* Normally, the Commanding Officer delegates most of the administrative and operational aspects of security to a subordinate, who is referred to in this manual as the Security Officer. The functions of this officer include planning, supervision, inspection, coordination, and submission of recommendations with respect to:

"a. Physical security

"(1) Internal security

• • • • • • • " [20]

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[17] *Id.* § 1409.

[18] Physical Security Manual § 0100.

[19] *Id.* § 0154.

[20] *Id.* § 0156.

"*Specific duties.* The planning, supervision and coordination of matters relating to the security of the command includes:

"a. *Internal security matters:*

"(1) Safeguarding from * * * the unauthorized disclosure of classified matter." [21]

It is argued by the Union that these Navy regulations and manuals were not published in the Federal Register pursuant to the requirements of Section 3 of the Administrative Procedure Act[22] and the Federal Register Act[23] [fol. 172] and thus were not valid. The section of the Administrative Procedure Act providing for publication begins:

"Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest * * *—

"(a) Every agency shall * * * publish in the Federal Register [etc.]."

Certainly the operation of an agency for the design, planning and production of naval guns and other ordnance is a function requiring secrecy in the public interest. The Attorney General's Manual on the Administrative Procedure Act cites as an illustration of the meaning of the provision: "Thus, the War Department obviously is not required to publish confidential matters of military organization and operation * * *." Therefore, in so far as these regulations apply to the Naval Gun Factory, they need not be published in order to establish their validity. We are not concerned with their validity in any other application. Furthermore the provision of the Act to which we have referred excepts from publication "any matter relating solely to the internal management of an agency". In so far as these regulations prescribe the authority of the

[21] *Id.* § 0156.3.

[22] 60 STAT. 238 (1946), 5 U.S.C. § 1002 (1958).

[23] 49 STAT. 501 (1935), 44 U.S.C. § 305(a)(2) (1958).

commanding officer over an installation such as the Gun Factory, they relate to the internal management of the Navy. The public effect is remote. The Committee Reports on the Bill which became the Administrative Procedure Act point out that the publication provisions were intended to make available to the general public such administrative operations and procedures as are public property. The authority of naval officers over naval operations can hardly be classified as public property. In so far as the Federal Register Act is concerned, no act of Congress required [fol. 173] publication; the Navy regulations had not been designated by the President as applicable to the general public; and thus were not required by this statute to be published.

It therefore seems clear that naval officers in command of naval installations have ample authority to control the ingress and egress of civilians to and from the premises of the command.[24]

The Exercise of Authority.

The contract made October 1, 1955, between the Board of Governors of the Naval Gun Factory Cafeterias and M & M Restaurants, Inc., provided in part:

> "• • • In no event shall the Concessionaire engage, or continue to engage, for operations under this Agreement, personnel who
>
> • • • • • • •
>
> "(iii) fail to meet the security requirements or other requirements under applicable regulations of the Activity, as determined by the Security Officer of the Activity."[25]

[24] The Congress has recognized the existence of such authority by prescribing penalties for the unauthorized entrance upon such naval installations. See, *e.g.*, 62 STAT. 765 (1948), 18 U.S.C. § 1382 (1958); 64 STAT. 1005 (1950), 50 U.S.C. § 797 (1958).

[25] Sec. 5(b). The predecessor contract, of December 1, 1949, in effect when Brawner was employed, provided in Art. IX(b): "Approval for the employment of any person by the Concessionaire to work in the Naval Gun Factory • • • shall be conditioned

In answer to an interrogatory posed in this lawsuit by the plaintiffs to the defendants concerning the procedure followed by the officials of the Naval Gun Factory to de- [fol. 174] termine whether a civilian, non-Governmental employee should be given an identification badge, the Governmental defendants answered that each applicant for an identification badge was required to complete an application form which contained the following: "I agree to obey all Naval Gun Factory Regulations • • • ." The execution of such an undertaking by Brawner is implicit and not denied.

Not only do the Government officers have technical authority to protect the privacy of premises such as a naval gun factory, but the right to do so is a right of the highest priority in the public interest. No one, we think, would question that right or its priority. Certainly the realisms of the world situation dictate its necessity. On the other hand, no individual citizen has a natural or inherent right to enter such premises. And we find no statute which confers such a right upon civilians. The only right of entrance possessed by a civilian is a right gained by contract or by specific permission. Brawner's only right to enter the Gun Factory was a right which she gained by way of her contract of employment. It was derived from a combination of two contracts, one between the Government and her employer and the other between her employer and her. Brawner's only right of entrance was subject to the flat, unequivocal contract provision that employees permitted entrance to the Factory must meet the security requirements of the command. We do not see how a contract right of an employee of a contractor with respect to the subject matter of the contract can be superior to the rights of the contractor in respect to that subject matter. If the rights of a contractor-employer are subject to limitations, the rights of employees under the contract are

---

upon the right of the Superintendent, or his duly designated representative, to cancel, revoke or withdraw the same for any cause or reason deemed sufficient by the Superintendent, or his representative, in the exercise of discretion, without the necessity for any showing of cause."

subject to the same limitations.[26] Thus, for example, if [fol. 175] a contract specifies a 40-hour work-week, no individual employee has a right to demand employment for 60 hours a week. Moreover we know of no rule of law or custom which requires that employees be informed of the terms of the employer's contract, to which they are not parties but by virtue of which they gain their employment.

Thus it clearly appears that the commanding officer at the Factory had a high priority right to protect entrance to the Factory and the civilian Brawner had merely a right derived from a contract which specifically provided that she must meet the security requirements of the officer. This being the situation, we fail to perceive any limitation upon the discretion of the commanding officer in respect to civilian presence within his command, except limitations imposed by higher naval authority. We find no rights of the public, or of any member thereof, which act as a restriction upon the otherwise unfettered discretion of naval officers in such a matter.

The contract between M & M Restaurants, Inc., and the Government contained no provision relating to procedure upon the denial of access to the Factory by an employee, but the contract between Brawner (via her representative, the Union) and her employer did provide a procedure in respect to disputes under that contract. It provided for arbitration. As we have seen, she was afforded that full procedure. She has had the full of her contractual procedural rights.

III. Power to Control Access *versus* Claimed Right to Employment at Naval Gun Factory

It is argued in Brawner's behalf that her right to employment was involved in her right to be daily upon this particular site; that this right to employment was a protected right; and that this protection reached through to create a protected right to be at a particular site of employment. We think principles applicable to employment as such are not applicable to the case we have before us.

[26] 2 WILLISTON, CONTRACTS § 364A & n. 5 and cases there collected (3d ed. 1959); *id.* § 394.

[fol. 176] We discuss those principles only because they are pressed upon us and we think they reflect some erroneous premises which we are in duty bound to indicate.

Employment—a Qualified Right.

In the first place it is obvious that no one has an unqualified right—inherent, statutory or constitutional—to enter upon such employment as he chooses. Qualification, or suitability, is a restriction upon any such right. For example, maintenance of strict secrecy in respect to certain matters which come naturally to an employee's knowledge in the ordinary course of his employment is a commonplace element of suitability for particular employment. Trade secrets in industry,[27] financial matters in business, official affairs in Government,[28] are within the scope of this custom. Furthermore the Government frequently requires that one be particularly qualified, even for private employment: for example, to be a nurse, or a barber, or an engineer, or a lawyer. A young man, even one out of college, has no unrestricted right to practice law. He must (1) study for a prescribed period and (2) qualify under tests sponsored by the judicial branch of the Government. It is after one has been qualified and licensed, or admitted, to a trade or profession that rights under contract or statute attach and a debarment from that occupation requires certain procedural steps.[29] And the same doctrine applies [fol. 177] where Government action is of such nature as to be a factual debarment of the individual from his vocation or profession, even though not a formal disbarment or cancellation of license. This is what the Supreme Court was talking about in *Greene* v. *McElroy*,[30] as the Court

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[27] See Blake, *Employee Agreements Not To Compete*, 73 HARV. L. REV. 625, 667-674 (1960).

[28] To take a simple example: a law clerk applicant may be a legal giant; he may have a most engaging personality; but, if he cannot be entrusted with judicial secrets, no judge would consider him suitable for appointment. The same principle obviously applies in all branches of the Government.

[29] See GELLHORN & BYSE, ADMINISTRATIVE LAW 768-779 (1954).

[30] 360 U.S. 474 (1959).

repeatedly emphasized in its opinion. The person there involved was an aeronautical engineer of such specialized training and capacity that access to classified information was essential to engagement in his profession. Denial of such access was a complete debarment.

Removal Process.

No employed person has an inherent or natural right (*i.e.*, a right apart from statute, regulation or contract) to any sort of process in respect to removal from his particular job.[31] In private employment an employee's rights in respect to discharge stem from the contract of employment. This is and always has been established law; it is one of the basic reasons for trade unions. The rights of Government employees in respect to removal from employment stem from statute or from regulations adopted by the authority by which they were employed. This has been established law throughout the history of this country.[32] Originally, as every student of history knows, the Executive authority had plenary power to remove summarily any and all Executive employees; and they did so.[33]

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[31] 35 AM. JUR. *Master and Servant* §§ 26, 34 (1941) and cases there cited.

[32] *See, e.g., Ex parte* Duncan N. Hennen, 38 U.S. (13 Pet.) 230, 259 (1839); Shurtleff v. United States, 189 U.S. 311 (1903); Myers v. United States, 272 U.S. 52 (1926); Humphrey's Executor v. United States, 295 U.S. 602 (1935).

[33] The history texts are replete with examples. FISH, THE CIVIL SERVICE AND THE PATRONAGE 13-14, 20, 26, 28, 39, 65, 120-121, 125, 130, 147, 153, 155, 160, 164, 166, 168, 170, 252 (1905); 4 CHANNING, HISTORY OF THE UNITED STATES 256-257 (1935); 5 CHANNING, *op. cit. supra* at 389 (1933); 6 CHANNING, *op. cit. supra* at 302 (1930); SCHUBERT, THE PRESIDENCY IN THE COURTS ch. 2 (1957); HACKER & KENDRICK, THE UNITED STATES SINCE 1865, pp. 99-100 (1934); HICKS, THE FEDERAL UNION 397 (1937); HART, TENURE OF OFFICE UNDER THE CONSTITUTION (1930); and see generally SAGESER, THE FIRST TWO DECADES OF THE PENDLETON ACT: A STUDY OF CIVIL SERVICE REFORM (Univ. Studies, U. of Neb., 1935); FOULKE, FIGHTING THE SPOILSMEN (1919); Richardson, *Problems in the Removal of Federal Civil Servants*, 54 MICH. L. REV. 219 (1955); Grundstein, *Presidential Power, Administration and Administrative Law*, 18 GEO. WASH. L. REV. 285, 296 *et seq.* (1950).

The climax of the long fight for security in the civil service [fol. 178] was the enactment of the Lloyd-La Follette Act in 1912. That Act, as amended, is still in force. It specifically provides: "No examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer or employee directing the removal or suspension without pay." [34]

That statute has been discussed under attack many times in the courts, but no court has ever intimated a shadow of unconstitutionality in it. The law is clear. Absent an express statutory protection, any Government office, the tenure of which is not fixed by the Constitution or set by statute, is subject to removal at pleasure. This one thread is the warp of the whole fabric of the case law; it appears throughout—from *Ex parte Duncan N. Hennen* in 1839[35] to *Vitarelli* v. *Seaton* in 1959.[36] Except for special classes, Government employees may be removed summarily without charges and, except for the provisions of the Lloyd-La Follette Act, without reasons. A holding to the con- [fol. 179] trary would necessitate a ruling that the Lloyd-La Follette Act is and always has been invalid; that the hundreds of employees discharged under its procedural terms since 1912 were wrongfully discharged; and that Government employment at all levels carries life tenure, *i.e.*, inherent, constitutionally protected invulnerability to discharge, except upon charges, open hearings, confrontation by witnesses, cross-examination, and findings. Such conclusions have no support in law, in our opinion.

Situs.

Finally, absent a special contract or circumstances constituting a total debarment from an occupation, an employee has virtually no rights in respect to the situs of his employment. Grocery chains, public utilities, law firms, and notably the Government, move employees about from

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[34] 37 STAT. 555, as amended, 62 STAT. 355 (1948), 5 U.S.C. § 652 (a) (1958).

[35] 38 U.S. (13 Pet.) 230.

[36] 359 U.S. 535.

place to place willy-nilly. It would be fantastic to propose seriously that an employee of a large employer has some sort of procedural rights which must be respected before he can be moved from here to there. Certainly the Government's many moves in decentralization programs give no heed to any such notion.

The young lawyer in our analogy, *supra*, has no right to employment by any particular person or client, or indeed to any clients at all. And his place of employment, his continued engagement in any particular matter or by any particular client, are entirely at the whim of his employers. To take a simple example: If the Government were to retain as consultants a private law firm, and the firm sent one of its young lawyers to do some of the work; and if a Government officer called a senior member of the firm and said, "This young man is too gabby for our purposes. Don't send him over here any more"; the young lawyer would have no rights of procedural process of any kind, sort or description.

Again by way of analogy, certainly no one would doubt the authority of the Supreme Court to require its private [fol. 180] printer to transfer a Linotype operator who, without wrongful intent, portrayed to his friends at afternoon stops in a convenient bar the nature of the opinions he was putting in print. No one would contend, we think, that the right of a Linotype operator to work on the advance printing of opinions of the Court is such that he could not be removed from the premises without a hearing in full panoply of charges, confrontation of witnesses, compulsory disclosures in public by his cronies, cross-examination, and findings. An investigation sufficient to satisfy the Court of the afternoon garrulity of the employee and a quiet word to the printer would be all such a situation would entail, we think. He could be put to work somewhere else.

We come back to the problem as to Brawner. She was not discharged. She was not debarred from her chosen occupation. She was offered a similar job by her same employer, and she refused. There are scores of places open to short-order cooks here and everywhere. The essence of her claim is that the site of her employment

cannot be changed unless charges are made against her and she has a full hearing with witnesses, etc. We find no substance whatever to her claim.

Stigma.

It is further argued in Brawner's behalf that the Governmental action has besmirched her reputation. Of course it has consistently been held that outright dismissals from Government employ, on stated grounds of malfeasance, bribery, or even attempted seduction, are validly accomplished without the traditional trappings of due process.[37] And we see no comparatively greater defamation in a [fol. 181] denial of entrance to a naval installation because of its security requirements. Nobody has said that Brawner is disloyal or is suspected of the slightest shadow of intentional wrongdoing. "Security requirements" at such an installation, like such requirements under many other circumstances, cover many matters other than loyalty. Certainly they must cover garrulity, honesty, a measure of judgment, sobriety, a high sense of one's obligations, etc. A naval installation such as a gun factory is in and of itself a confidential matter of highest priority, and many of its vital features are observable by anyone on the premises. Many physical characteristics of guns or machinery may be observable and transmittable by the most inexpert observer. The mere presence of certain officers may be important. The normal idle lunchtime chatter of employees in such operations may be saturated with comment which may well be inconsequential upon the premises but pregnant with danger outside it. Security regulations for such places are not to be restricted to control of access to copies of papers or limited to the locking of a safe at night. Security regulations in such an installation may well include an impenetrable silence on Factory matters and events, no matter how trivial they may appear to a reviewing

[37] Eberlein v. United States, 257 U.S. 82 (1918); Golding v. United States, 78 Ct.Cl. 682, *cert. denied*, 292 U.S. 643 (1934); Kent v. United States, 105 Ct.Cl. 280 (1946); Richardson, *Problems in the Removal of Federal Civil Servants*, 54 MICH. L. REV. 219, 240 *et seq.* (1955).

court. Denial of employment at a Navy installation because of its security requirements is certainly no more of a stigma than is a discharge for almost any reason. Almost any discharge is a "stigma". But such discharges are not protected by any inherent right to confrontation, cross-examination, etc. The rhetoric in these arguments is greater than their substance.

Third-Party Interference.

We come now to another phase of Brawner's case. It is argued to us that in this case the Government (*i.e.*, the Governmental appellees) stands in the position of a third-party tort-feasor; that is, it was guilty of interfering with [fol. 182] an employment contract.[38] That contract was Brawner's contract (via her representative, the Union) with her employer. In the first place we note this is not the typical case of third-party interference. Admittedly the Governmental action did constitute an "interference" with Brawner's continued employment at a particular situs. The precise question is whether this "interference" was illegal, that is, constituted an actionable wrong. As we have already seen, vis-a-vis his employer, no employee has an inherent right to work at a particular situs. Such a right may under some circumstances exist vis-a-vis a stranger to the employment relationship. But under the

[38] The cases stating the law pertinent to this tort are collected in Annots., 29 A.L.R. 532 (1924); 84 A.L.R. 43 (1933), *supplemented*, 26 A.L.R. 2d 1227 (1952); 9 A.L.R. 2d 228 (1950). The law in this area developed from early recognition of a right of action for intentional interference with a man's business, Garret v. Taylor, Cro. Jac. 567, 79 Eng. Rep. 485 (1621), to include protection of one's right to a livelihood, *e.g.*, Truax v. Raich, 239 U.S. 33 (1915) (involving an employment relationship terminable at will by the parties); Owen v. Williams, 322 Mass. 356, 77 N.E.2d 318 (1948). We must note that the United States as such cannot be liable in damages for "interference with contract rights" (including employment contracts) under the Federal Tort Claims Act, 28 U.S.C. § 2680(h) (1958). See Dupree v. United States, 264 F.2d 140 (3d Cir.), *cert. denied*, 361 U.S. 823 (1959). In view of our disposition of the case, we need not reach the question whether the appellants are seeking to hold the United States, and not merely the Governmental appellees, liable for such damages.

law of third-party-interference a defendant is not liable if the alleged interference is no more than the exercise of a legal right equal to or greater than the right claimed by the employee.[39] The Government had such a right, [fol. 183] namely, the right to exclude people from the Gun Factory. Through the Board of Governors of the Gun Factory Cafeterias, the Government recited this right in Section 5(b) of its contract with M & M Restaurants, Inc. This right was exercised by the Government, through the Governmental appellees, by enforcement of the contract. This right is clearly equal to, or greater than, whatever right Brawner could claim to work at the particular situs. Furthermore, not only did the Governmental appellees exercise a legal right; they performed the legal duty of exercising their discretion under the applicable regulations. We find no liability on the Governmental appellees as third-party tort-feasors.

IV. Liability of M & M Restaurants, Inc.

We next consider the liability of the concessionaire. It is argued to us that the agreement between M & M Restaurants, Inc., and the Union, the latter acting on behalf of all employees, contained a provision that employees should not be discharged without good and sufficient cause. To this there are two answers. In the first place, Brawner was not discharged. In the second place, if she had been discharged, surely, so far as her employer was concerned, the refusal of the commanding officer of the Factory to approve her entrance upon the Factory premises was a good and sufficient cause for the employer to release her from employment.

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[39] See Spalding v. Vilas, 161 U.S. 483 (1896) (Postmaster General held not liable in damages even if he acted maliciously); Annot., 29 A.L.R. 532, 533 (1924). In Donovan v. T. & P. Ry., 64 Tex. 519 (1885), an employee of a freight hauling company lost his position because the railway, by regulation, barred all but railway employees from access to its warehouse. The railway was found not liable, because it had a legal right to adopt such a regulation.

V. Greene v. McElroy

Greene v. *McElroy, supra,* is cited to us as controlling. We think it does not treat of our problem. In the first place *Greene* dealt only with the "authorization" relied upon by the Government officers. The Court was quite [fol. 184] explicit about this delimitation. We do not have that line of authorization in our case, and the authority dealing with entrance upon naval installations, which we have recited, is clear and ample. In the next place, as we have pointed out, *Greene* dealt with a total debarment, in fact even though not technically, from a chosen occupation. The testimony was, as recited in footnote 11 to the Court's opinion: "In view of his [Greene's] position with the company, there was no work which he could do in light of this denial of clearance by the Navy. As a result, it was necessary for the company to discharge him." We have no such case here. In the concurring opinion in *Joint Anti-Fascist Refugee Committee* v. *McGrath*,[40] which the Court cites in *Greene*, Mr. Justice Frankfurter emphasizes the historic background of the procedural requirements in different types of proceedings. The Justice said in part:

> "The Court has responded to the infinite variety and perplexity of the tasks of government by recognizing that what is unfair in one situation may be fair in another. * * * The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment.
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> "* * * Finally, summary administrative procedure may be sanctioned by history or obvious necessity."[41]

[40] 341 U.S. 123 (1951).

[41] *Id.* at 163, 168.

We have discussed the historic background of our present problem, the precise nature of the interest affected, and the other factors mentioned in the quoted passage. Nothing [fol. 185] in that study suggests a hearing, with witnesses, etc., in respect to employment at a particular place, where the circumstances do not spell total debarment from an occupation.

We hold only that under the circumstances of this case —including the statutes, the regulations, the nature of the place involved, the two contracts, and the arbitration proceeding—no rights of appellant Brawner were violated by the lifting of her identification badge for entrance to the Gun Factory. We have discussed other subjects only because they were pressed upon us by way of argument and must needs be discussed.

The judgment of the District Court is

Affirmed.

DANAHER, *Circuit Judge,* concurring: The dissenting opinion seems to condemn a majority of the court for the decision to rehear the case *en banc.* I am impelled to comment for I had dissented from Judge Edgerton's opinion now annexed to Judge Fahy's present text, as is my original dissent.

It has been fittingly observed that our power to rehear a case *en banc* should be exercised "sparingly," particularly at the instance of one of the parties.[1] "Moderation and self- [fol. 186] restraint" control the exercise of our discretion in deciding such motions, but one criterion, at least, in-

[1] It may prove of interest to observe that there have been 72 such motions in the current court year and only 2 have been granted. Our Clerk's records show as to motions for rehearing *en banc* filed by one of the parties: in the court year 1958-1959, 97 such motions were filed and we granted but 1; in the preceding court year, 84 such motions were filed and we granted but 2; in the court year 1956-1957, 48 such motions were filed but we granted none; in 1955-1956, 32 such motions were filed and we granted but 3; in 1954-1955, 35 such motions were filed and we granted none, while in the preceding year we granted but 1 of 21 motions. Thus, of 389 such motions in the last seven court years, only 9 have been granted.

volves the effect of an erroneous opinion which may set a precedent for this Circuit.

Our dissenting brothers observe that after appeal in this case had been taken, none of the parties and no member of the division assigned to hear the case and no other member of the court requested that the case be heard *en banc*. Overlooked is the fact that a unanimous division of this court had decided our *Greene* v. *McElroy* on April 17, 1958,[2] where the situation and the circumstances went far beyond those presented in the instant case. There was no slightest reason for any member of the court or for counsel for the parties to assume what course ultimately might be followed in the *Greene* case.

The Supreme Court granted *certiorari* in *Greene* v. *McElroy* on October 27, 1958.[3] The instant case, before a division of the court differently constituted from that which had heard the *Greene* case, was argued February 19, 1959. The sitting division decided to await the action of the Supreme Court. Neither counsel nor any other member of the court then knew that we had done so, nor could any of us know that the Supreme Court on June 29, 1959 would hand down its decision reversing *Greene* v. *McElroy*.[4]

Not until August 21, 1959 during summer recess, with most of the judges away, could it publicly be known that a majority of the sitting division had concluded that the [fol. 187] instant case was deemed to be controlled by the Supreme Court's decision in *Greene* v. *McElroy*. When Government counsel saw the opinion of the majority, a motion for rehearing *en banc* was promptly filed.

After our judges had returned for the Fall sessions of the court and had had an opportunity to read the majority opinion with the opposing dissent, and to consider the Government's pending motion, the case was ordered on for argument before the full court on November 9, 1959.

What did the record disclose? A private corporation had had a contract with the United States Government to

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[2] 103 U.S.App.D.C. 87, 254 F.2d 944.

[3] 358 U.S. 872.

[4] 360 U.S. 474. Argument was had on April 1, 1959.

operate a cafeteria in the Naval Gun Factory, owned by the United States. The contractor, M & M Restaurants, Inc., had as one of its employees, Rachel Brawner. As a cook, like other private, non-Government personnel, she was privileged to enter upon the premises of the United States Government only while in possession of a badge of identification, required by naval regulations.

The Board of Governors at the Naval Gun Factory had been notified by the Navy's security officer that Rachel Brawner "would have to surrender her Naval Gun Factory badge and would not be permitted to enter the Naval Gun Factory *until clearance is certified by the Security Officer.*" (Emphasis added.) Mr. Baker, representing M & M, was requested to return Mrs. Brawner's badge, and he did so. Mr. Baker informed Mrs. Brawner that he had picked up her badge "for security reasons." [5]

The appellant union instituted arbitration proceedings, extensively conducted thereafter. It was then brought out that the union represents 2,000 members who are privately [fol. 188] employed by restaurants in Government buildings and 600 members who are commercially employed in cafeterias and restaurants in this area. One of the arbitrators, Samuel H. Jaffe, Esquire, of the firm of Jaffe and Dunau, dissented from the arbitration award. He argued in his dissent against the determination by those in command that Mrs. Brawner did not meet "basic requirements and thus her pass was revoked." He pointed out that there is "no *greater threat to the very existence of a labor organization* than to permit an employer the unilateral action it has indulged here." (Emphasis added.) He further assailed the action of the security officer as "in excess of his authority or under authority not validly conferred. For otherwise no government employee could ever have successfully challenged his ouster from public employment on security grounds: the government could simply

[5] Mr. Baker's interpretation may not seem accurate. The notice indicated that Mrs. Brawner had become subject to further check. "Security" could mean many things. Mrs. Brawner might even have been personally insanitary in her food handling and had so become a risk. We have not been told just what prompted the further check on Mrs. Brawner.

answer his protest by saying that the government cannot be required to permit him to work in a building it owns and from which his entry could be barred."

As will be seen from the majority opinion of the sitting division, Judge Edgerton adopted the position urged by Mr. Jaffe. He found the naval officer's order invalid in terms of *Greene* v. *McElroy* as lacking safeguards of confrontation and cross-examination, and "if," he said, "if" Navy regulations purported to justify the order, the regulations "as in the *Greene* case" were likewise similarly deficient. He adopted the analogy offered by Mr. Jaffe that the Government might "deprive government employees of their jobs on similar grounds, without giving them a hearing, by simply excluding them from the places where they work." Of course, we were not dealing here with a Government employee. Again, even Government employees in *unprotected* status may be dismissed out of hand. They have protected employment rights only if and when Congress confers such rights.

Thus, as our judges examined the record, it became apparent that there is much more to the problem than at first seems to meet the eye.

[fol. 189] Mrs. Brawner's employer, M & M, offered her other employment at a different installation operated by it. She refused. That there are scores of privately operated concessions in Government buildings is common knowledge. It is reasonable to assume that private employment as a cook may be available in hundreds upon hundreds of restaurants and cafeterias in the Washington area. This is not a case of "barricading" Mrs. Brawner against employment, as the Supreme Court found had happened to Greene. But it *is* a case of the union insisting that it may place and keep one of its members in a *private* employment status in a *particular* job, in a *particular* place on *Government* property even when Government authorities direct that access be denied "until clearance is certified by the Security Officer."

Never to my knowledge had there been such a challenge to the Government's right to protect its own Navy installation. Throughout our history, the authority of a Navy commandant had not been questioned as he exer-

cised controls over those seeking or claiming the privilege of access to Government property in his charge. I dissented from the majority views. For one thing, I thought the Commandant independently possessed the power he asserted. Again, to the extent that a majority of the sitting division found that the Navy regulations, if relied upon, might have been invalid, I particularly sought to "dissociate myself from the suggestion that invalidity implicitly turns upon whether, in application, provision has been made for 'confrontation and cross-examination' of sources whose reports may have led to revocation of the privilege of access to the Government's enclave."

I believe a privately employed worker hired by a Government contractor may enter upon Government property only as a matter of privilege which may be accorded or withdrawn as those lawfully charged with responsibility for maintenance of the property may prescribe. I believe no hearing need necessarily be required. To illustrate, I [fol. 190] believe confrontation by accusers and a right of cross-examination are not essentials to a valid revocation of "passes" permitting lawyers to use the Supreme Court library, or passes to visitors to the White House, or to employees of public utilities and other contractors servicing Government buildings. It might seem that any of many indiscretions or, specifically a food-handler's personal habits, could prompt such revocation. Even though a privately employed person has no *authorized* access to a file room in a highly sensitive naval gun factory, if such a person without authorization should be observed in that file room, I think the security officer may order a suspension of the privilege of access pending clearance. I think that officer lawfully might demand that the employer transfer or otherwise deal with the employee without granting confrontation by accusers or a right to cross-examination of them. Even if it were a Government employee in an unprotected status no hearing of any kind whatever would be required.[6]

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[6] See Vitarelli v. Seaton, 359 U.S. 535 (1959); Bailey v. Richardson, 86 U.S.App.D.C. 248, 182 F.2d 46 (1950), *aff'd* 341 U.S. 918 (1951).

Since the Government had had no opportunity to present its arguments in the light of Judge Edgerton's application of *Greene* v. *McElroy*, a majority of the whole court decided to hear this case *en banc*. We have no means of knowing whether the Supreme Court will take a case or not. We do know that, unless reversed, a majority opinion here establishes a precedent for this Circuit. If the views of the two judges were to bind the other seven judges comprising this court here at the seat of government, we would indeed be laying down a new rule of law to control the Government's administration of its property.[7] [fol. 191] So we voted to rehear the case *en banc* and to consider the Government's arguments. Some of the factors distinguishing this case from *Greene* may be summarized:

Here, unlike *Greene*, there was no showing that the cook could not get another position. On the contrary, her own employer offered her another job which she declined.

Here, unlike *Greene*, it was the Government's own weapons producing property which was involved.

Here, unlike *Greene* where neither Congress nor Executive Order had authorized the particular procedure applied in *Greene*, we have the Constitution and the statutes expressly providing for control of military and naval establishments by officers selected for that responsibility. Indeed, Congress has made it a criminal offense for an unauthorized person to trespass upon the property.

Here, unlike *Greene* where an Industrial Security Clearance Program was challenged, we find a mere suspension of privilege of access "until clearance is certified"—and no regulation purported to authorize or to provide a right to a hearing.

Here, unlike *Greene* where a specially trained aeronautical engineer was typical of thousands who would potentially be deprived of private employment and "barricaded" against other work, we must balance the Government's

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[7] We, *ourselves*, refused to permit members of a bar association to conduct evening moot court sessions in this court house, essentially on grounds of building security. If the privilege had in fact been granted, would we have been precluded from revoking it without a hearing? and charges? and accusers? and confrontation and cross examination?

concern in its own protection in terms of excluding possibly undesirable employees of private contractors who may be employable elsewhere.

Finally, a majority of our judges may well have concluded that a majority of the sitting division had read into *Greene* what the Supreme Court said it had read out of it. Rehearing *en banc* was ordered because we believed [fol. 192] Judge Edgerton's opinion *might* be erroneous. We all heard and considered the case and now decide that it was erroneous. Judge Fahy would have us reinstate an opinion which most of us believe to be erroneous. I am unable to subscribe to the view that to perpetuate error makes for sound judicial administration.

As I see it, the Supreme Court, the Judicial Conference of the United States and Congress support the position taken by a majority of the court. I think there is great "call for this court *en banc* to overrule the [erroneous] decision of the division" which first heard the case. I quite understand that there had been differing approaches in a circumstance such as this, but I think the problem has been solved, not only by 28 U.S.C. § 46(c) but by the *Western Pacific Railroad Case*.[8]

Before the *Western Pacific Railroad Case* was decided, the late Chief Judge Stephens delivered a paper before the District Bar Association, pointing to our practice of fur-

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[8] 345 U.S. 247 (1953); views suggesting those held by Judge Fahy may be noted at page 265. The Supreme Court already had stated otherwise in Textile Mills Corp. v. Comm'r., 314 U.S. 326 (1941). At page 335 Mr. Justice Douglas wrote:

> "Conflicts within a circuit will be avoided. Finality of decision in the circuit courts of appeal will be promoted. Those considerations are especially important in view of the fact that in our federal judicial system these courts are the courts of last resort in the run of ordinary cases. Such considerations are, of course, not for us to weigh in case Congress has devised a system where the judges of a court are prohibited from sitting *en banc*. But where, as here, the case on the statute is not foreclosed, they aid in tipping the scales in favor of the more practicable interpretation."

And see Civil Aero. Bd. v. Am. Air Transp., 344 U.S. 4, 5 (1952) where the Court told this circuit it "may now wish to hear this case *en banc* to resolve the deadlock indicated in the certificate and give full review to the entire case."

nishing the draft opinion of a sitting division to the other [fol. 193] members of the court. He listed cases[9] where the court had sat *en banc* after Congress had adopted 28 U.S.C. § 46(c), tracing recognition of its power to do so back to *Textile Mills Corp.* v. *Comm'r, supra* note 8.[10]

In the Conference of Senior Circuit Judges meeting on October 1, 1938, with Chief Justice Hughes presiding, Judge Stone of the Eighth Circuit brought up the question "of determining how many judges will sit in a given case." The Chief Justice asked: ". . . would it meet your point if the statute provided that the court shall consist of three judges unless in the opinion of the majority of circuit judges a larger court or a court of a greater number of judges at any time shall be deemed desirable?" [11] Following discussion, Judge Wilbur moved and the Conference adopted in substance, the proposal that Congress [fol. 194] be asked to legislate that a majority of the circuit judges might provide for a court of more than three judges when in their opinion unusual circumstances make

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[9] 20 Journal D.C. B.A. 103, 107, 108 (1953); at that time, 1953-1954, the Chief Judge made up the sitting divisions, assigning judges whose recognized differing viewpoints might be balanced in the consideration of each case. But since this court thereafter inaugurated the plan of choosing judges by lot, combinations of two particular judges holding similar "policy" views may occur with greater or less frequency, depending upon the dates they select for their assignments. Situations have arisen where a majority of the court has found itself at odds with particular opinions in cases as to which *sua sponte*, the full court has sometimes ordered rehearings *en banc*. See footnote 10.

[10] The following tabulation, relevant to footnote 9, discloses that the court has *sua sponte* ordered rehearings *en banc* as follows:

	Motions	Granted
1953-1954	1	1
1954-1955	9	5
1955-1956	4	4
1956-1957	8	8
1957-1958	13	8
1958-1959	4	4
1959-1960	7	1

[11] Minutes of the Conference, p. 360.

such action advisable. The Conference so recommended, in 1938 and each successive year, until in 1941, the House adopted H.R. 3390. Its report No. 1246[12] drew upon a letter from Judge Biggs dated February 14, 1941, reporting the recommendation of the Judicial Conference that Congress act favorably on the measure. Judge Biggs noted that the Conference deemed it advisable that all the active and available judges of the circuit should be included "to avoid any ground for suspicion that particular judges of the court, more than three but less than all, were selected to bring about a particular decision."[13] He added: "It was to avoid the determination of decisions by a minority of judges, although in the utmost good faith, that did not represent the judgment of the court as a whole, that the measure was recommended by the Judicial Conference . . . ."

The Senate in 1941 had before it S. 1053, the counterpart of the House measure. The Judicial Conference in special session in January, 1941, had recommended its passage. Administrator Chandler at the April hearings presented the favorable views of the Judicial Conference, quoting, in part, from a letter reflecting the Conference position:

> "Many cases are of a highly controversial nature and permit, not unreasonably, diverse views of the [fol. 195] law. We think that if there be a controversial case a majority of the court should not be bound by a decision of two members, particularly if the other members of the court are plainly of the opinion that the question is of such importance that they desire

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[12] See footnote 14, Textile Mills Corp. v. Comm'r., 314 U.S. at 334-35. The Committee report deemed *en banc* consideration desirable. "It also will obviate the situation where there are seven members of the court and as sometimes happens a decision of two judges (there having been a dissent) sets the precedent for the remaining judges."

[13] Letter on file, Administrative Office of United States Courts. Congress by the Act of August 3, 1949, 63 STAT. 493, added three judges to this court. Three of our Circuit Judges received recess appointments on October 21, 1949.

to have their say in regard to what they think the law is."[14]

Such was the background as reported *by the senior circuit judges themselves* for the ultimate adoption of 28 U.S.C. § 46(c). Congress cautiously examined the problem for many years in the light of Judicial Conference recommendations and Supreme Court pronouncements before codifying section 46(c).[15]

[fol. 196] Of course we may—and most often do—decide not to resort to section 46(c). We may even refuse to do so altogether. We may then attempt to certify unresolved questions to the Supreme Court, but we may find them dismissed.[16] We may let successive divisions develop a conflict within the circuit. Is that result to be desired? I

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[14] *Hearings Before the Subcommittee of the Senate Committee on the Judiciary*, 77th Cong., 1st Sess., re S. 1053, pp. 15-16 (1941). Additional legislative history may be found in Western Pacific Railroad Case, *supra* note 8, particularly at 254, and footnotes 8 *et seq.*; and see *En Banc Proceedings in the United* (sic) *Courts of Appeals*, 22 GEO. WASH. L. REV. 482 (1954).

[15] Western Pacific Railroad Case, *supra* note 8, at 253, 254; and see *Hearing and Rehearing Cases In Banc*, 14 F.R.D. 91, 96-97 where Judge Maris wrote:

> "A decision of a controversial question made by a majority of all the judges of the court in banc obviously has much greater authority than a decision by two concurring judges of a panel of three which all the other five judges of the court might consider quite erroneous. True such matters could be corrected by the Supreme Court on certiorari but that court should not have to resolve conflicts of decision within a single court. The procedure in banc enables the court itself to deal authoritatively with problems of this nature, thus relieving the burden of the Supreme Court. The Circuit Judges of the Third Circuit think that this procedure has been very helpful in maintaining the very high esprit de corps which they enjoy. For each of them knows that in any case in which they are seriously divided in opinion they will all have an opportunity to participate in the ultimate decision which the court is to make and which under the doctrine of stare decisis is to be binding upon them in future cases."

[16] See, *e.g.*, In re Burwell, 350 U.S. 521 (1956), where the Court at 522 hinted at its Western Pacific case, as pointing a route to decision; and Civil Aero. Bd. v. Am. Air Transp., *supra* note 8.

reject any such course, and believe we should earnestly attempt to decide and thus to settle our own differences—by majority action of the whole court. And that is precisely what the Supreme Court has told us to do.

> "[A]ll but two Circuits have more than three Circuit Judges. This undoubtedly raises problems when one panel has doubts about a previous decision by another panel of the same court. . . . It is primarily the task of a Court of Appeals to reconcile its internal difficulties." [17]

Rehearings *en banc* pursuant to section 46(c) in most cases have achieved definitive disposition of controversial and decisive differences. I do not regard as wasted the time so spent, particularly when we look back upon the multiple conferences and the often futile exchanges of memoranda as we *otherwise* have sought agreement. Reconciliation of deeply held views has sometimes presented an imponderable problem in courts other than ours. A determination here by *en banc* rehearing and decision seems to me a highly salutary course. In that spirit we approached this very case.

The dissenters here would "reinstate" the opinion of the sitting division. A majority of the whole court, all [fol. 197] nine judges voting, deem it erroneous. We thus assert and exert the authority conferred by 28 U.S.C. § 46(c) precisely in furtherance of one of the important purposes of the legislation as recommended by the Judicial Conference and as recognized by Congress.[18] We have acted under "a grant of power to order hearings and rehearings

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[17] Wisniewski v. United States, 353 U.S. 901-02 (1957), and cases cited. And see, *e.g.*, Starr v. United States, 105 U.S.App.D.C. 91, 264 F.2d 377 (1958), *cert. denied*, 359 U.S. 936 (1959); Brown v. United States, 105 U.S.App.D.C. 77, 264 F.2d 363, *cert. denied*, 360 U.S. 911 (1959).

[18] It is reasonable to suppose the Supreme Court will agree. It has told us "Our [its] general power to supervise the administration of justice in the federal courts . . . does not extend to disregarding a validly enacted and applicable statute or permitting departure from it . . . ." United States v. Nat. City Lines, 334 U.S. 573, 589 (1948).

en banc and to establish the procedure governing the exercise of that power," [19] as the Supreme Court recognized.

In that view condemnation of the present majority by two of our colleagues may seem inapropos. I concur in the opinion by Chief Judge Prettyman.

I am authorized to state that Chief Judge Prettyman and Circuit Judges Wilbur K. Miller, Bastian and Burger concur in my opinion.

FAHY, *Circuit Judge,* with whom EDGERTON, *Circuit Judge,* joins, *dissenting*: In my opinion, while according due respect to those of a contrary view, rehearing this case en banc, a matter for the exercise of the sound discretion of the full membership of the court, should not have been granted after the decision of the division. The statutory structure of this court of nine members, any three of whom constitute a court, is designed to enable us to keep abreast of our work as it increases in volume over the years. Though I do not question our power to [fol. 198] rehear any case en banc it is a power to be exercised sparingly and only for good cause.[1]

Appellant Rachel M. Brawner, the private individual concerned, and the appellant labor organization of which she was a member, brought an action in the District Court on September 6, 1957, claiming that she had been illegally deprived by the Government, on security grounds, of her private employment as a cook in a cafeteria which was located with Government approval in the Naval Gun Factory. The District Court decided against her on July 21, 1958. She and the Union appealed to this court on August 14, 1958. Neither the appellants, nor the United States; nor any member of the division of this court assigned to hear the case, nor any other member of this court, requested that the case be heard en banc. The division ac-

[19] Western Pacific Railroad Case, *supra* note 8, 345 U.S. at 267.

[1] The late Chief Judge Stephens stated his views upon the subject some years ago for the information of the Bar. 20 D. C. Bar Ass'n Jour. 105-09 (1953).

cordingly heard argument, and took the case under advisement, in February 1959. There was then pending in the Supreme Court *Greene* v. *McElroy*, 360 U.S. 474. That case also involved the discharge, demanded by the Government on security grounds, of a person in private employment. Mr. Greene was an employee of a company manufacturing products for the Defense Department. He was authorized to have access to classified information, which our appellant was not. The division which heard the present appeal awaited the decision of the Supreme Court in *Greene* v. *McElroy*, which came down June 29, 1959. Reversing this court, the Supreme Court held that Mr. Greene's deprivation of employment was unauthorized.

Neither the United States, nor appellants, nor any of the nine members of this court, then sought reargument of appellants' case, en banc or otherwise. On August 21, 1959, the division which had heard this case decided it, [fol. 199] holding, especially in light of *Greene* v. *McElroy*, that appellant Brawner's discharge had not been validly accomplished, one judge dissenting. Five weeks later, on September 25, 1959, rehearing en banc was sought for the first time, by the United States, in order to obtain a reversal of our decision, thus using the full court of nine judges as a court of appeals over a division.

When the division decided the case it became ripe for consideration by the Supreme Court. When the United States nevertheless requested a rehearing en banc, each of the nine members of this court was called upon to consider the appropriate course for the litigation to take. Five members voted at this late stage to rehear the case en banc. It was accordingly set down for reargument, and reargued. It has now been re-decided, the earlier two to one decision of the division being reversed by a vote of five to four. Many months and much judicial and professional labor have been consumed in the en banc process, with final termination of the litigation still uncertain and probably far removed. A decision is rendered which four of us think clearly inconsistent with principles laid down by the Supreme Court in recently reversing this court in *Greene* v. *McElroy*. Appellant

Brawner--unless she has wearied of the matter--will no doubt seek Supreme Court review. In that event the Supreme Court will be faced, as it could quite as well have been faced many months ago when the decision of the division was rendered, with the question whether or not to review the case. There was no call for this court en banc to review the decision of the division because, by reason of the nature of our court and of this case, the responsibility of decision at the level of this court had been fully met. It seems to me that in such a case as this the possibility of a different result should then have been left, as it is now much later left, to the Supreme Court. Even if the decision of the division be doubtful nothing has been advanced, and everything has [fol. 200] been retarded, for both the individual and the Government, by the substitution nearly eight months later of a decision no less doubtful.

Were the case of only local importance, and therefore one in which a decision deemed by a majority of the full court to be erroneous must be corrected if at all by the court en banc, because not worthy of presentation to the Supreme Court, then our court en banc might perhaps have been more warranted in intervening. *Larkin* v. *United States*, —— U.S. App. D.C. ——, —— F.2d ——, is illustrative. But even in such a case moderation and self-restraint would be in order, for the philosophy underlying the structure of this appellate court does not contemplate ordinarily a superior appellate court within the court itself. Moreover, had request for en banc hearing of this case been made before the division heard it, or even before the division decided it, such a hearing might reasonably have been granted because of the obvious importance of the case. But en banc intervention after the decision of the division has served merely to retard ultimate disposition of the litigation, with no countervailing advantage to either the public or the private interests involved.

My views thus expressed are not in condemnation of my brethren of the majority, but only an expression of opinion, different from theirs, as to the use of the en banc power.

I would vacate the order granting the rehearing en banc and would reinstate the opinion and judgment of this court first filed.

I add that deprivation of employment on security grounds is a grave injury. The public draws no sharp distinction between security and loyalty. *Cf. Vitarelli* v. *Seaton*, 359 U.S. 535. As the Supreme Court has said of exclusion from public employment on disloyalty grounds, "In the view of the community, the stain is a deep one; indeed, it has become a badge of infamy." [fol. 201] *Wieman* v. *Updegraff*, 344 U.S. 183, 191. Engineer and cook alike suffer, in spirit and in reputation. They should have equal protection.

The opinion of this court first filed, and the dissenting opinion filed at the same time, were as follows:

Before EDGERTON, FAHY, and DANAHER, *Circuit Judges.*

EDGERTON, *Circuit Judge*: A private corporation, M & M Restaurants, Inc., under a contract with government officers, operated a cafeteria in the Naval Gun Factory, property of the United States. The corporation employed appellant Brawner, a civilian, as a cook. Without a hearing of any sort, the Superintendent and the Security Officer of the Naval Gun Factory excluded her from the premises and thereby deprived her of her job. They said she did not meet the "security requirements". No one told either her or the corporation which employed her what the security requirements were, or why she was believed not to meet them. The employer asked for "a hearing relative to the denial of admittance to the Naval Gun Factory of Rachel Brawner." The request was refused.

Brawner and her labor union sued the Secretary of Defense, the Secretary of the Navy, the Superintendent and the Security Officer of the Gun Factory, and also Brawner's employer, for the loss of her job, and have appealed from a summary judgment dismissing the complaint.

Except with respect to the employer, the District Court erred. This has now become clear. On June 29, 1959, the Supreme Court determined that the Secretary of Defense and his subordinates have not been empowered to deny a contractor's employee access to his work, and thereby deprive him of his job, on security grounds, "in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination." *Greene* v. *McElroy*, 360 U.S. 474. What government officers are not empowered to do in such a proceeding, which includes a limited sort of hearing, they are not empowered to do in a proceeding that includes no hearing at all. As in the *Greene* [fol. 202] case, if the action of the government officers was in accordance with Navy regulations, the regulations were unauthorized and invalid.

It is immaterial that Greene's working place does not appear to have been, as Brawner's was, on government property. From the premise that "the United States could validly exclude all persons from access to the Naval Gun Factory", appellees draw the conclusion that the Secretary of Defense could validly exclude Brawner from her work there, on "security" grounds, without giving her a hearing. If the conclusion followed from the premise, it would likewise follow that the Secretary could deprive government employees of their jobs on similar grounds, without giving them a hearing, by simply excluding them from the places where they work. But neither Congress nor the President has authorized any such thing. And it is clear that government officials may not deprive government employees of their jobs on security grounds except as authorized by Congress or the President. *Peters* v. *Hobby*, 349 U.S. 331; *Cole* v. *Young*, 351 U.S. 536.

The government challenges the standing of appellant labor union to sue. We think the union here had standing to protect the interests of its members.[1]

[1] The union was the recognized representative of the employees of M & M Restaurants, Inc., under a collective bargaining agreement between the union and the Restaurants. The agreement

Cf. Nat'l Ass'n for the Advancement of Colored People v. *Alabama*, 357 U.S. 449, 459-460; *MacArthur Liquors, Inc.* v. *Palisades Citizens Ass'n*, 105 U.S. App. D.C. 180, 265 F. 2d 372.

Since Brawner's employer could not employ her within the Naval Gun Factory, the only place where [fol. 203] it had contracted to employ her, when the government appellees would not let her enter the place, it is not responsible for ceasing to employ her. Appellants' claim against the employer is for alleged breach of contract, and impossibility of performance defeats the claim. The judgment in favor of M & M Restaurants, Inc., is therefore affirmed. The judgment in favor of the government appellees is reversed and the case is remanded to the District Court for proceedings consistent herewith.

So ordered.

DANAHER, *Circuit Judge*: I concur specifically in the majority's opinion affirming the judgment in favor of M & M Restaurants, Inc. Otherwise I dissent.

To say that some officials may have abused their authority is not to deny that authority exists. This is not such a situation as was presented in *Greene* v. *McElroy*, 360 U.S. 474. The property here is owned by the Government and is part of the naval establishment. Control of access to the Naval Gun Factory has legally been vested in the Superintendent. When the public may enter and for what purposes and under what circumstances may be determined by that officer, in accordance with governing regulations. Congress has even made it a criminal offense, under

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authorized the union to participate in any dispute arising thereunder, including a dispute over discharge of any employee. When Implant Foods, Inc., replaced the Restaurants as the operator of the cafeteria, the new collective bargaining contract included a provision whereby Implant agreed to reinstate appellant with full rights should this suit be determined in her favor. *Cf. Fishgold* v. *Sullivan Corp.*, 328 U.S. 275, 283.

some circumstances, for unauthorized personnel to be upon the premises. 18 U.S.C. § 1382 (1952).

The basic principle of control by the Government of its own naval establishment is here paramount, I think. Truck drivers, plumbers, telephone operators, electricians, artisans in every walk of life, in one way or other and at one time or other may have legitimate business with a naval base, but the privilege of access is to be extended and may be continued only as those charged with maintaining the security of the Government's operation may by regulation prescribe. If some petty thief or numbers player or narcotics peddler or otherwise unfit person should insist upon continuance of a previously extended [fol. 204] privilege of access, I think the regulations authorize the Superintendent to bar him.

I am unable to conclude that regulations under which the officials here acted were invalid or unauthorized. Particularly do I dissociate myself from the suggestion that invalidity implicitly turns upon whether, in application, provision has been made for "confrontation and cross-examination" of sources whose reports may have led to revocation of the privilege of access to the Government's enclave.

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BAZELON and WASHINGTON, *Circuit Judges, dissenting*: We agree with Judges Edgerton and Fahy that the case must be reversed on the authority of *Greene* v. *McElroy*. We note also that we joined them in voting against rehearing en banc.

[fol. 205] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,689

Civil 2246-57

CAFETERIA AND RESTAURANT WORKERS UNION, LOCAL 473, AFL-CIO, et al., Appellants,

v.

NEIL H. MCELROY, Individually and as Secretary of Defense, et al., Appellees.

Appeal from the United States District Court for the District of Columbia.

Before: Prettyman, Chief Judge, and Edgerton, Wilbur K. Miller, Bazelon, Fahy, Washington, Danaher, Bastian and Burger, Circuit Judges, sitting en banc.

JUDGMENT—April 14, 1960

This cause came on to be reheard en banc on the record on appeal from the United States District Court for the District of Columbia, and was reargued by counsel.

On Consideration Whereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

Per Chief Judge Prettyman.

Dated: April 14, 1960.

Separate concurring opinion by Circuit Judge Danaher.

Separate dissenting opinion by Circuit Judge Fahy, with whom Circuit Judge Edgerton joins.

Separate dissenting opinion by Circuit Judges Bazelon and Washington.

[fol. 206] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Title omitted]

ORDER WITHDRAWING OPINION OF AUGUST 21, 1959—
April 18, 1960

It is Ordered by the court that the opinions (majority opinion by Circuit Judge Edgerton, concurring opinion by Circuit Judge Fahy and the opinion of Circuit Judge Danaher concurring in part and dissenting in part) filed August 21, 1959, in the above-entitled case, are hereby withdrawn and shall not be published in the Reports.

Per Curiam.

Dated: April 18, 1960

[fol. 207] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Title omitted]

ORDER CORRECTING JUDGE DANAHER'S OPINION—
April 21, 1960

It is Ordered that after the word "inapropos" at the end of my separate concurring opinion (p. 35 of the printed text) filed herein April 14, 1960, the following new sentence be added:

"I concur in the opinion by Chief Judge Prettyman."

Dated: April 21, 1960

John A. Danaher, Circuit Judge.

[fol. 208] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Title omitted]

ORDER FURTHER CORRECTING JUDGE DANAHER'S OPINION —April 25, 1960

It is hereby Ordered that the following new paragraph be added at the end of my concurring opinion filed April 14, 1960, in the above case:

I am authorized to state that Chief Judge Prettyman and Circuit Judges Wilbur K. Miller, Bastian and Burger concur in my opinion.

John A. Danaher, Circuit Judge.

Dated: April 25, 1960

[fol. 209] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Title omitted]

MOTION TO SUBSTITUTE APPELLEE THOMAS S. GATES AS THE PARTY APPELLEE IN THE OFFICE OF SECRETARY OF DEFENSE —Filed April 27, 1960

Pursuant to Rule 28(b) of the rules of this Court and Rule 25(d) of the Federal Rules of Civil Procedure, appellants move to substitute Appellee Thomas S. Gates as the party appellee in the office of Secretary of Defense.

1. The action in this case was commenced, *inter alia*, against defendant Thomas S. Gates, individually and as Secretary of the Navy, and against Neil H. McElroy, in-

dividually and as Secretary of Defense. On December 1, 1959, Neil H. McElroy resigned as Secretary of Defense, and on December 2, 1959, Thomas S. Gates was appointed as Secretary of Defense. As successor in the office of Secretary of Defense, appellee Thomas S. Gates adopts and continues the action of his predecessor. For the purpose of prosecuting a petition for a writ of certiorari there is substantial need for continuing and maintaining the action against appellee Thomas S. Gates individually and as Secretary of Defense. Accordingly, appellee Thomas S. Gates should be substituted as the party appellee in the office of Secretary of Defense, so that the action may proceed against him individually and as Secretary of Defense.

2. Appellee Thomas S. Gates appears to acquiesce in this substitution. In appellees' answer to the motion to supplement record, they state, "Appellees do not object to an order amending the title of this action to describe appellee Gates as now Secretary of Defense."

[fol. 210] 3. It is the position of appellants that the substitution of appellee Thomas S. Gates as the party appellee in the office of the Secretary of Defense does not abate the action against appellee Neil H. McElory in his individual capacity for the purpose of recovering money damages against him for the harm caused by the alleged wrong.

Wherefore, this motion should be granted.

Bernard Dunau, 912 Dupont Circle Building, N.W., Washington 6, D.C., Attorney for Appellants.

Certificate of Service (omitted in printing).

[fol. 211] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CAFETERIA AND RESTAURANT WORKERS UNION, LOCAL 473, AFL-CIO, et al., Appellants,

v.

NEIL H. McELROY, individually, and as Secretary of Defense, et al., Appellees.

Before: Prettyman, Chief Judge, in Chambers.

ORDER GRANTING MOTION TO SUBSTITUTE—May 18, 1960

Upon consideration of appellants' motion to substitute Thomas S. Gates, Secretary of Defense, as a party appellee Secretary of Defense in place of Neil H. McElroy, as Secretary of Defense, and it appearing that no objections have been filed, it is

Ordered that Thomas S. Gates, Secretary of Defense, is substituted as an appellee in his office of Secretary of Defense in the place and stead of Neil H. McElroy as Secretary of Defense.

Dated: May 18, 1960

[fol. 214] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 215] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,689

[Title omitted]

MOTION TO DISMISS THE APPEAL AS TO NEIL H. MCELROY, AS AN INDIVIDUAL—Filed May 3, 1960

1. Now come the governmental appellees and noting that the Court on April 25, 1960, entered an order denying appellants' motion to supplement the record wherein it was requested that this action continue against Neil H. McElroy individually and noting that appellant on April 26, 1960, filed a motion with the Clerk of this Court for the substitution of Thomas S. Gates for Neil H. McElroy in the office of Secretary of Defense, the appellees move to dismiss this appeal as to appellee Neil H. McElroy in his individual capacity:

2. No allegation has been made upon which individual liability might be predicated.

3. It is abundantly clear that appellee's only relationship to the case was the responsibility imposed by law upon the office of the Secretary of Defense for the action of his subordinates in the course of their official duties.

[fol. 216] 4. Appellees' brief, beginning at page 36, discusses in detail the applicable law. It is quoted in part, for the convenience of the Court:

> It is well settled that public officers when acting within the scope of their official authority are immune from suit for civil damages from a person claiming injury to their rights, *Spalding* v. *Vilas*, 161 U.S. 483, 498; *Gregoire* v. *Biddle*, 177 F. 2d 579, 581 (C.A. 2), certiorari denied 339 U.S. 949; *Cooper* v. *O'Connor*, 69 U.S.

App. D.C. 100, 103, 99 F. 2d 135, 138, certiorari denied 305 U.S. 643; *Laughlin* v. *Rosenman*, 82 U. S. App. D.C. 164, 163 F. 2d 838. As this Court said in the leading case of *Cooper* v. *O'Connor, supra*, 99 F. 2d at 138:

> "[i]f the Act complained of was done within the scope of the officers duties as defined by law, the policy of the law is that he shall not be subjected to the harassment of civil litigation or be liable for civil damages because of a mistake of fact occurring in the exercise of his judgment or discretion, or because of an erroneous construction and application of the law."

Wherefore, it is respectfully submitted that this motion should be granted.

J. Walter Yeagley, Assistant Attorney General; DeWitt White, George B. Searls, Attorneys, Department of Justice, Washington 25, D. C., Attorneys for Appellees.

[fol. 217] Certificate of Service (omitted in printing).

[fol. 218] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CAFETERIA AND RESTAURANT WORKERS UNION, LOCAL 473, AFL-CIO, et al., Appellants,

v.

THOMAS S. GATES, individually, and as Secretary of Defense, et al., Appellees.

Before: Prettyman, Chief Judge, Edgerton, Wilbur K. Miller, Bazelon, Fahy, Washington, Danaher, Bastian and Burger, Circuit Judges, in Chambers.

ORDER GRANTING THE MOTION TO DISMISS AS TO NEIL H. McELROY—June 2, 1960

Upon consideration of appellees' motion to dismiss this appeal as to Neil H. McElroy individually, it is

Ordered by the court that insofar as this appeal relates to Neil H. McElroy as an individual the appeal is dismissed.

Per Curiam.

Dated: June 2, 1960

[fol. 219] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,689

[Title omitted]

APPELLEES' MOTION TO RECONSIDER AND REAFFIRM THE COURT'S ORDER OF JUNE 2, 1960 GRANTING APPELLEES' MOTION TO DISMISS AS TO NEIL H. MCELROY, IN HIS INDIVIDUAL CAPACITY—Filed June 7, 1960

1. On February 1, 1960 the appellants filed a "Motion to Supplement the Record" and on February 8, 1960 they filed a reply to appellees' answer to that motion. In these pleadings appellants set forth their desire that this action continue against Neil H. McElroy in his individual capacity. This motion was denied by the Court by an order entered April 25, 1960.

2. Appellants moved on April 26, 1960 for the substitution of Thomas S. Gates, in his capacity as Secretary of Defense, in the place and stead of Neil H. McElroy, who had been Secretary of Defense at the time of the commencement of this action. Without objection from the appellees the court granted this motion by order dated May 18, 1960.

[fol. 220] 3. The appellees, on May 3, 1960, moved to dismiss the appeal as to Neil H. McElroy as an individual which motion was granted by the court by order dated June 2, 1960. On June 3, 1960, Mr. Bernard Dunau, counsel for appellants, telephonically advised that he had just received a copy of the court's order of June 2, 1960, but that he had not received a copy of the appellees' motion, and that had he received the motion he would have filed an opposition thereto. We immediately made a check in an effort to verify the question of service. It appears, as best we can ascertain, that a letter of transmittal of the motion to Mr. Dunau was prepared. However, our Division

mailroom which should have a record of the letter if it was sent in the normal course, contains no such record of the transmittal letter to Mr. Dunau having been sent. In view of that and the fact that Mr. Dunau did not receive a copy of the motion, we regret that we must conclude that a letter transmitting the motion was not, in fact, sent due to some administrative inadvertency. A copy of our motion of May 3, 1960 is being forwarded to Mr. Dunau today along with a copy of this motion.

4. Since proper service was not made due to our apparent mistake, the appellees respectfully hereby move the court to afford the appellants a reasonable opportunity to file such answer to our previous motion as may be appropriate. Appellees also move that the court then, upon receipt of appellants' answer, reconsider the order of June 2, 1960. Since we understand from Mr. Dunau as a result of our telephone conversation on Friday that the [fol. 221] position of the appellants with respect to our motion of May 3, 1960 to dismiss the appeal as to Mr. McElroy individually will be substantially identical to the position they have previously expressed in this case in connection with the issue involved, it is our position that the court's order of June 2, 1960 should be reaffirmed.

Respectfully submitted,

J. Walter Yeagley, Assistant Attorney General; DeWitt White, George B. Searls, Attorneys, Department of Justice, Attorneys for Appellees.

[fol. 222] Certificate of Service (omitted in printing).

[fol. 223] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,689

CAFETERIA AND RESTAURANT WORKERS UNION, LOCAL 473, AFL-CIO, et al., Appellants,

v.

NEIL H. McELROY, et al., Appellees.

ANSWER TO MOTION TO RECONSIDER AND REAFFIRM THE COURT'S ORDER OF JUNE 2, 1960, AND CROSS-MOTION TO VACATE THE ORDER OF JUNE 2, 1960, AND TO DENY WITHOUT PREJUDICE APPELLEES' MOTION OF MAY 3, 1960—Filed June 13, 1960

Appellants answer appellees' motion to reconsider and reaffirm the Court's order of June 2, 1960, and cross-move to vacate the order of June 2, 1960, and to deny appellees' motion to dismiss of May 3, 1960, without prejudice to the filing of a motion to dismiss in the Supreme Court of the United States or in any further proceedings which may eventuate from the proceedings in the Supreme Court of the United States.

1. On April 25, 1960, the Court denied appellants' motion to supplement the record "without prejudice to filing by appellants of a motion to substitute party appellees as provided for by Rule 25(d) of the Federal Rules of Civil Procedure and without prejudice to filing by appellees of a motion to dismiss 'his appeal as to appellee Neil H. McElroy in his individual capacity." On April 27, 1960, appellees moved "to substitute Appellee Thomas S. Gates as the party appellee in the office of Secretary of Defense." On May 18, 1960, the Court ordered that "Thomas S. Gates, Secretary of Defense, is substituted as an appellee in his office as Secretary of Defense in the place and stead

of Neil H. McElroy as Secretary of Defense." On May 24, 1960, appellants filed a petition for a writ of certiorari in the Supreme Court of the United States. *Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO, Et Al. v. Neil H. McElroy, Individually, Et Al.*, No. 953, October Term 1959. In the petition Neil H. McElroy was named a party respondent.

[fol. 224] At the time of filing the petition for a writ of certiorari, counsel for appellants did not know that there were any pending motions before this Court. On June 2, 1960, subsequent to the filing of the petition for a writ of certiorari, this Court entered an order that "insofar as this appeal relates to Neil H. McElroy as an individual the appeal is dismissed." Receipt of this order on June 3, 1960 was the first knowledge that counsel for appellants had of the pendency of a motion to dismiss the appeal as to Neil H. McElroy. Counsel for appellants had not before then received any such motion. Counsel for appellees, in their motion to reconsider and reaffirm this Court's order of June 2, 1960, admirably and frankly state that, after checking into the question of service, "we must conclude that a letter transmitting the motion was not, in fact, sent due to some administrative inadvertency" (p. 2).

In the absence of service of the motion to dismiss the appeal as to Neil H. McElroy, it would appear that the order of June 2, 1960, granting that motion should be vacated for lack of notice of and opportunity to be heard on the motion. Furthermore, the order was entered on June 2, 1960, subsequent to the filing of the petition for a writ of certiorari on May 24, 1960. Consequently, the order was entered after the case was already before the Supreme Court.

The "Motion to Reconsider and Reaffirm the Court's Order of June 2, 1960 Granting Appellees' Motion to Dismiss as to Neil H. McElroy in His Individual Capacity," served on June 6, 1960, is in substance a renewal of the original motion to dismiss. Since the case is presently pending before the Supreme Court, this Court would appear to have no jurisdiction to entertain a motion to dismiss an appeal which is no longer before it. In any event, even

if jurisdiction exists, comity suggests that this Court should stay its hand and decline to dismiss an appeal as to a party who has already been named as a respondent in a petition for a writ of certiorari pending before the Supreme Court. In short, the case is now before the Supreme Court, and any further action to secure dismissal as to Neil H. McElroy should be taken in the proceedings before that court.

[fol. 225] 2. It would appear that analytically the sole basis for dismissing the appeal as to Neil H. McElroy would be that as a matter of substantive law there is no merit in the claim to recover from him money damages caused by the alleged wrong. *Barr* v. *Matteo*, 360 U.S. 564, which holds that damages are not recoverable from an officer for his performance of an *authorized* act from *improper* motives, adopts in substance the rationale of *Gregoire* v. *Biddle*, 177 F.2d 579 (C.A. 2). 360 U.S. at 571-572. The latter case is explicit that "The decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers. . . " 177 F.2d at 581. In this case the gravamen of the claim is, not improper motive, but action taken which is unauthorized or unconstitutional. Action by an officer which is unauthorized or unconstitutional is not "within the scope of his powers. . . ." And, as this Court put it, immunity exists only when the officers are "acting within the scope of their official authority . . . . " *Jones* v. *Kennedy*, 73 App. D.C. 292, 121 F.2d 40, 42, cert. denied, 314 U.S. 665. The "question here is, as it is in all cases where this doctrine of immunity is advanced, were these officials acting within the scope of their authority in the performance of the duties of their respective offices?" *Gibson* v. *Reynolds*, 172 F.2d 95, 98-99 (C.A. 8), cert. denied, 337 U.S. 925.

Upon the basis of this Court's disposition of this case, it had no occasion to reach the question whether, though unauthorized or unconstitutional, the harm caused by the action was not compensable by damages. For having found that no wrong was committed, it followed that no relief could be had, damages or otherwise. However, the subsequent dismissal of the appeal as to Neil H. McElroy, in

addition to the previous affirmance of the judgment as to him, necessarily required the Court to conclude that, even if he had taken unauthorized or unconstitutional action, no damages would be recoverable from him for any harm caused by his action. Since disposition of the appeal in favor of Neil H. McElroy does not require more than affirmance of the judgment, the Court may wish to defer decision of the question underlying dismissal of the appeal until this or another case assumes a posture which requires decision.

[fol. 226] Wherefore, the Court should vacate its order of June 2, 1960, and deny appellees' motion of May 3, 1960, without prejudice to the filing of a motion to like effect in the Supreme Court of the United States or in any further proceedings which may eventuate from the proceedings in the Supreme Court.

Respectfully submitted,

Bernard Dunau, 912 Dupont Circle Building, N.W., Washington 6, D.C., Attorney for Appellants.

Certificate of Service (omitted in printing).

[fol. 227] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,689

[Title omitted]

APPELLEES' ANSWER TO APPELLANTS' CROSS-MOTION TO VACATE THE ORDER OF JUNE 2, 1960 AND TO DENY WITHOUT PREJUDICE APPELLEES' MOTION OF MAY 3, 1960—Filed June 18, 1960

This is in opposition to appellants' cross-motion to vacate the order of June 2, 1960, and to deny without prejudice appellees' motion of May 3, 1960.

The appellants point out that they filed a petition for writ of certiorari in the Supreme Court on May 24, 1960 and suggest that appellees' motion to dismiss the appeal as to Neil H. McElroy should be dismissed without prejudice on the ground, *inter alia*, that "this Court would appear to have no jurisdiction to entertain a motion to dismiss an appeal which is no longer before it." The appellants further suggest that even if this Court has jurisdiction at this time to act on appellees' motion of May 3, that comity suggests that this Court should decline to dismiss an appeal as to a party who has already been named as a respondent in a petition for writ of certiorari.

As we have urged since the initiation of this case by the appellants, and on the basis of the authorities set forth in our brief and repeated in the motion to dismiss, we think it abundantly clear that appellee McElroy on the [fol. 228] facts in this record, cannot be held liable for damages in his individual capacity. The test applicable here, briefly stated, is whether the act complained of occurred in the course of official action and in an action which is within the scope of the duties of the governmental officer. If we are correct there is no reason why appellee McElroy should continue as a party to this action, in view of the substitution of appellee Gates, in his new capacity as Secretary of Defense. If appellee McElroy cannot be held individually liable, it would avail appellants nothing to have him continued as a party to the action regardless of the outcome of any action which may be taken by the Supreme Court in reviewing the judgment of this Court in this case.

As to the suggestion by the appellants that this Court has lost jurisdiction in the matter or should stay its hand because of comity, we think the suggestion is inaccurate.

Only after a writ of certiorari is granted would this Court lose jurisdiction of the case. "A writ of certiorari issued to a subordinate court operates as a supersedeas from the time of its service or of formal notice, suspending the power of the court to which it is issued to take further action in the case until it is finally disposed of by the reviewing court." *Waskey* v. *Hammer*, 179 F. 273.

"It is clear that this Court has jurisdiction to act while a petition for certiorari is pending and to do so is not a violation of the principle of comity. As Chief Justice Taft said when speaking for the Supreme Court in *Magnum Co. v. Coty*, 262 U.S. 159, "It involves no disrespect to this Court for the Circuit Court of Appeals to refuse to withhold its mandate or to suspend the operation of its judgment or decree pending application for certiorari to us. [fol. 229] If it thinks a question should be ruled upon by this Court, it may certify it. If it does not certify, it may still consider the case as one in which a certiorari may properly issue, and may in its discretion facilitate the application by withholding the mandate or suspending its decree. This is a matter wholly within its discretion."

Wherefore, it is respectfully submitted that appellants' Cross-Motion to Vacate the Order of June 2, 1960 and to Deny Without Prejudice Appellees' Motion of May 3, 1960 should be denied and that Appellees' Motion to Reconsider and Reaffirm the Court's Order of June 2, 1960 should be granted.

Respectfully submitted,

J. Walter Yeagley, Assistant Attorney General; DeWitt White, George B. Searls, Attorneys, Department of Justice, Attorneys for Appellees.

Certificate of Service (omitted in printing).

[fol. 230] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,689

CAFETERIA AND RESTAURANT WORKERS UNION, LOCAL 473, AFL-CIO, et al., Appellants,

v.

THOMAS S. GATES, individually, and as Secretary of Defense, et al., Appellees.

Before: Prettyman, Chief Judge, Edgerton, Wilbur K. Miller, Bazelon, Fahy, Washington, Danaher, Bastian, and Burger, Circuit Judges, in Chambers.

ORDER REAFFIRMING ITS ORDER OF JUNE 2, 1960, DISMISSING THE APPEAL AS TO NEIL H. MCELROY—June 30, 1960

On consideration of appellees' motion to reconsider and reaffirm the court's order of June 2, 1960, of appellants' answer and cross-motion to vacate the order of June 2, 1960, and of appellees' reply, it is

Ordered by the court that appellees' motion to reconsider is granted and the order of this court entered herein on June 2, 1960, dismissing this appeal insofar as it relates to Neil H. McElroy as an individual is reaffirmed.

Per Curiam.

Dated: June 30, 1960

[fol. 231] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,689

[Title omitted]

MOTION TO TRANSMIT ADDITIONAL PARTS OF THE RECORD IN THIS COURT TO THE SUPREME COURT—Filed October 20, 1960

On May 24, 1960, the appellants in this case filed a petition for writ of certiorari in the Supreme Court. Subsequent to the filing of the petition for writ of certiorari, this court granted appellees' motion of May 3, 1960 to dismiss the appeal as to Neil H. McElroy in his individual capacity, and this order was reaffirmed by order of June 30, 1960.

On October 10, 1960, the Supreme Court granted the petition for writ of certiorari to review this court's judgment of April 14, 1960 in this case. The appellants did not file a petition for writ of certiorari from this court's order of June 30, 1960, dismissing the appeal insofar as it relates to Neil McElroy in his individual capacity. Appellees' motion of May 3, 1960 to dismiss as to Mr. McElroy and the subsequent motions and orders relating thereto have not been transmitted to the Supreme Court, since the appellants' designation of the record was filed on April 25, 1960, prior to the filing of the aforesaid motions and orders. [fol. 232] Appellees therefore move for the preparation by the Clerk of a certified copy of the following parts of the record in this court to be transmitted to the Supreme Court of the United States for use in that Court's consideration of this case:

1. Appellees' Motion of May 3, 1960 to dismiss the appeal as to Neil H. McElroy in his individual capacity.
2. Order of June 2, 1960 granting the Motion to Dismiss as to Neil McElroy.

3. Appellees' Motion of June 7, 1960 to Reconsider and Reaffirm the court's order of June 2, 1960.

4. Answer to Motion to Reconsider and Reaffirm the court's order of June 2, 1960 and cross-motion to vacate the order of June 2, 1960.

5. Appellees' Answer to Appellants' Cross-Motion to Vacate the order of June 2, 1960.

6. Order of June 30, 1960 reaffirming order of June 2, 1960 dismissing the appeal insofar as it relates to Neil McElroy as an individual.

J. Walter Yeagley, Assistant Attorney General; George B. Searls, DeWitt White, Attorneys, Department of Justice, Attorneys for Appellees.

Certificate of Service (omitted in printing).

[fol. 233] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 234]

SUPREME COURT OF THE UNITED STATES

No. 97, October Term, 1960

CAFETERIA AND RESTAURANT WORKERS UNION, LOCAL 473, AFL-CIO, et al., Petitioners,

vs.

NEIL H. MCELROY, et al.

ORDER ALLOWING CERTIORARI—October 10, 1960

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.